United States Court of Appeals

for the Second Circuit

APPENDIX

77-7210

77-7244

United States Court of Appeals

For the Second Circuit.

UNITED STATES COURT OF APPEALS
FILED
JUN 27 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

B/S

THE SPRAGUE & RHODES COMMODITY CORP.,
Plaintiff,

against

S. S. TORONTO, her engines, etc., WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S,
Defendants, Third-Party Plaintiffs-Appellees,

against

PITTSTON STEVEDORING CORP.,
Third-Party Defendant-Appellant.

ON APPEAL BY THIRD-PARTY DEFENDANT FROM FINAL JUDGMENT IN FAVOR OF DEFENDANTS, THIRD-PARTY PLAINTIFFS AGAINST THIRD-PARTY DEFENDANT.

JOINT APPENDIX.

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(1768)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. TORONTO, her engines, etc., WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S,

Defendants, Third-Party Plaintiffs-Appellees,

-against-

PITTSTON STEVEDORING CORP.,

Third-Party Defendant-Appellant.

On Appeal by Third-Party Defendant from Final Judgment in Favor of Defendants, Third-Party Plaintiffs against Third-Party Defendant.

DOCKET ENTRIES.

DATE	PROCEEDINGS	Date Order or Judgment Noted
Aug 3-72	Filed Complaint. Issued Summons.	
Aug.11-72	Filed summons with marshal's ret. Served Barber Steamship Lines, Inc. by Westcott Chadj on 8/8/72.	
Sep 14-72	Filed Stip and Order that the time for defts Paul R. Brown and United States Telephone to answer is hereby extended to 10-13-72 from 9-13-72. FRANKEL,J.	
Oct 16-72	Filed Defts, W. Wilhelmsen, Barber Steamship Lines, Inc and Barber Lines A/S ANSWER to the complaint.	G,H,P&H
Oct 16-72	Filed defts notice to take deposition of pltff on 11-14-72.	
Mar22-73	Filed deft's notice of motion re: order permitting defts to implead Pittston Stevedoring Corp as 3rd pty deft per to Rule 14 FRCP. ret: 4-5-73.	
Apr 17.73	Filed Summons and marshals ret. Served: Pittston Stevedoring Corp. on 4/11/73.	
Apr 9.73	Filed Third Party Complaint.	
pr 5.73	Filed Memo. End. on motion dated 3/22/73. Motion granted on consent submit order. Ryan J (M/N)	
Apr 6.73	Filed Order. Ordered dfts. may file 3rd pty dd Complaint, etc. Ryan J. (M/N)	

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DOCKET ENTRIES

Aug-9-73	Filed 3rd pty deft. Notice to produce for inspection & copying.	
Aug-9-73	Filed 3rd pty deft. ANSWER TO 3rd pty Complaint.	SFW
Aug-9-73	Filed 3rd pty deft. Interrogs.	
Dec.27.73	Filed Memorandum of Law of 3rd pty deft. Pittston Stevedoring Corp. in support of its motion for summary judgment.	
Dec.27.73	Filed 3rd pty Deft. Notice of Motion. Re: Summary judgment. ret. 1/24/73.	
Jan 18 74	Filed of M E De Orchis in opposition to the motion of 3rd party deft. for summary judgement	
Jan 18 74	Filed deft & 3rd pary pltffs memo in oppositon to deft motion of summary judgemnt	
Jan 2.74	Filed Reply Affidavit of William Werner of Mr. M.E. DeOrchis dated 1/18/74.	
Jan 2.74	Filed Memo End. on motion dated 12/27/73. Motion to dismiss is granted & judgment is directed to be entered by the Clerk forthwith dismiss the complaint against the 3rd pty deft. with prejudice. Ryan J. (mailed notice)	
Jan 12.74	Filed Judgment. Ordered that 3rd pty deft. have judgment against deft. 3rd pty pltff. dismissing 3rd pty complaint with prejudice. Clerk.(mailed notice)	
Jan 12.74	Filed Deft. & 3rd pty pltffs. Notice of Motion. Re: Summary Judgment. ret. 3/28/74	
Jan 12.74	Filed Deft. & 3rd pty pltffs. Memorandum of Law.	
Apr 4.74	Filed Memo. End. on motion dated 3/19/74. Motion to reargue is granted & on reargument, decision of granting summary judgmen to 3rd pty deft. Pittston Stevedoring Corp. is vacated,etc. If the Clerk has entered judgment he is directe to recall & cancel it. Ryan J. (mailed notice)	
Apr 4.74	Filed 3rd pty deft. Pittston Stevedoring corp. Memorandum of law.	
Apr 9.74	Filed Defts. & 3rd pty pltffs. Cross Notice to take deposition of3rd pty deft. on 5/7/74.	
Apr 10.74	Filed 3rd pty deft. Notice of Deposition of defts. & 3rd pty pltffs. on 5/7/74.	
Sep 30.74	Filed Deft's. & 3rd pty Pltff's. notice of examination before trial of the 3rd pty Deft. on 10-14-74.	
Sep 30.74	Filed Deft's. & 3rd pty Pltff's. notice of examination before trial of the Pltff. on 10-15-74.	
Oct 7.74	Filed 3rd pty deft's (Pittston Stevedoring Corp.) notice to take deposition of Wilh Wilhelmsen. et al	
Oct 7.74	Filed 3rd pty deft's (Pittston Stevedoring Corp.) notice to take deposition of Shipowner Claims Bureau, etc	
[illegible]	Pre Trial Conference held Bernikow, U. S. MAG.	
05-21-76	PRE-TRIAL CONFERENCE HELD BY CONNER, J	
06-24-76	Filed third-pty deft's proposed findings of fact and conclusions of law.	(To: W.C.C.)
06-30-76	Filed pltff's trial memorandum.	
06-30-76	Filed pltff's proposed findings of fact and conclusions of law.	
07-01-76	BEFORE CONNER, J. NON-JURY TRIAL BEGUN, CONT'D AND CONCLUDED. Judge's Decision-Reserved.	
07-06-76	Filed Defts. & third-pty pltffs. Wilh Wilhelmsen, Barber Steamship Lines and Barber Lines A/S. proposed findings of fact and conclusions of law	
07-06-76	Filed trial brief on behalfof deft. & third-pty pltff, Barber Steamship Lines, Inc. and Barter Lines A/S, hereinafter referred to as Barber.	
07-16-76	Filed brief for third-pty deft. Pittston Stevedoring Corp.	
07-16-76	Filed third-pty deft. Pittston's summary of the deposition upon oral examination of Mr. Edmund J. Schneider taken on 11-15-74	
08-11-76	Filed Pltff's Reply Brief	
08-16-76	Filed Deft and Third-pty Pltff Barber Steamship Lines,Inc. and Barber Lines A/S Reply Post-Trial Brief.	
08-27-76	Filed reply brief for third-pty deft.	
12-13-76	Filed transcript of record of proceedings [illegible] 7-01-76	

DOCKET ENTRIES

03-01-77	Filed OPINION # 45648-- for the reasons stated, I find for pltff. in the sum of $ 44,422.44, together with interest at the rate of six per cent per annum computed on $ 42.863.77 from 1-19-72, and on $1,609.48 from 4-13-72, plus costs- for third-pty pltffs. in theamount paid to pltff, together with costs, reasonable atyy's fees, and disbursements. Settle judgment order on notice. CONNER, J. (m/n)	
03-24-77	Filed Final Judgment # 77,425-- that the plff. have judgment against the defts., the S.S. " Toronto", her engines, etc. and Wilh Wilhelmsen and Barber Steamship Lines, Inc. and Barter Lines A/S in the amount of $44,422.44 with interest and taxable costs as indicated in the total amount of $58,279.83 and there being no just reason for delay of entry of this judgment, etc.. CONNER, J. Judgment entered 3-24-77 Clerk (m/n)	
04-15-77	Filed stip & order that the reasonable attys' fees expended by third-pty pltffs. in defending pltff's complaint amount to $669.38. So ordered- CONNER, J.	
04-18-77	Filed Final Judgment # 77,517-- that the defts. and third-pty pltffs. have judgment against the third-pty deft. for: the $58,279.83 awarded to pltff. in the Judgment dated 3-22-77; post-judgment interest to the date of this Judgment amounting to $258.67; reasonable attys' fees in the amount of $669.38 and taxable costs in the amount of $1,140.12 for a total of $60, 348.00 CONNER, J. Judgment entered 4-19-77. Clerk (m/n)	
04-25-77	Filed defts. & third-pty pltffs. notice of appeal to USCA from judgment entered by pltff. pursuant to Rule 54(b) FRCP on 3-24-77. Copies to: Bigham, Englar, Jones & Houston and Symmers, Fish & Warner. Entered 4-26-77.	
04-25-77	Filed undertaking for costs on appeal in the sum of $250.00- National Surety Corp.	
04-14-77	Filed true copy of USCA stip & order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, etc. as indicated.	
05-18-77	Filed third-pty deft. Pittston Stevedoring Corp. notice of appeal to the USCA from the final Judgment (No.77,517) dated 4-18-77 and entered 4-19-77. Copies mailed to:Haight, Gardner, Poor and Havens; and Bigham, Englar, Jones & Houston.. Ent. 5-18-77	
05-18-77	Filed Supersedeas Bond # 28 92 58 for undertaking on appeal in the sum of $ 62,500.00- Insurance Company of North America	
*May 10-76	Filed consent pre-trial order. Ryan,J.	
May 27-77	Filed stipulation that submitted therewith is a true copy of exhibit no. 13.	
May 27-77	Filed 3rd party deft. Pittston Stevedoring's designation of exhibits.	

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COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
AUG 3 10 46 AM '72
S.D. OF N.Y.

THE SPRAGUE & RHODES COMMODITY CORP., Plaintiff,	CIVIL ACTION
-against-	FILE NO.
S.S. "TORONTO" her engines, boilers, etc.,	C O M P L A I N T
-and against-	
WILH WILHELMSEN, and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S Defendants.	

JUDGE RYAN

72 CIV. 3294

1. This is a case of cargo damage and loss, civil and maritime, and is an admiralty and maritime claim, within the meaning of Rule 9(h). Plaintiff invokes the maritime procedures specified in Rule 9(h).

2. Plaintiff, The Sprague and Rhodes Commodity Corporation, is a corporation, or organization existing as a legal entity, under the laws of the State of New York, with an office for the regular transaction of business at No. 99 Wall Street, in the Borough of Manhattan, City, County, and State of New York.

3. Defendant, Wilh Wilhelmsen, upon information and belief, is a corporation, or organization existing as a legal entity, under the laws of the Kingdom of Norway, with

an office for the regular transaction of business in the City of Tonsberg, Norway, and, at all times hereinafter mentioned, was the owner of the S.S. "TORONTO".

4. Defendant, Barber Steamship Lines, Inc., upon information and belief, is a corporation, or organization existing as a legal entity, under the laws of the State of New York, with an office for the regular transaction of business at No. 17 Battery Place, in the Borough of Manhattan, City, County and State of New York. Barber Lines A/S, upon information and belief, is a corporation, or organization existing as a legal entity, under the laws of a foreign country. At all times mentioned in the complaint, defendants, Barber Steamship Lines, Inc., and/or Barber Lines A/S, were the charterer of the S.S."TORONTO" and operated said vessel for the carriage of goods by water for hire, between the Ports of Assab, Ethiopia, and New York, New York.

5. On the 2nd day of August, 1971, A. Besse & Co. (Ethiopia) S.C., Addis Ababa, as consignor/shipper, delivered to the defendants, as common carriers of goods by water for hire, at the Port of Assab, Ethiopia, in good order and condition, 2099 bags of Gimbi Handpicked Coffee, U.G.Q. for transportation aboard the S.S."TORONTO" to the Port of New York, New York, (option Baltimore, Maryland), and delivery there to the plaintiff, The Sprague and Rhodes Commodity Corporation, or order, in consideration of an

agreed freight rate and pursuant to the valid terms of bills of lading, Nos. 5 and 6, dated Assab, Ethiopia, August 2nd, 1971.

6. Defendants, Barber Steamship Lines, Inc., and Barber Lines A/S, caused said goods, still in good condition, to be laden on board the S.S."TORONTO". On September 4, 1971 the S.S."TORONTO" arrived at Pier 9A, Port Authority Terminal, Brooklyn, New York, and delivered there the aforementioned shipment of Gimbi Handpicked Coffee, U.G.Q. under the aforementioned bills of lading, with a shortage and non-delivery of, at least, 781 bags of coffee.

7. Prior to September 4, 1971, the plaintiff, for value, became the owner of said shipment and the owner and holder of the said bills of lading and brings this suit, on its own behalf, and that of all others interested in said shipment.

8. All conditions precedent, required of the plaintiff, and of all others interested in said shipment, have been duly performed.

9. By reason of the premises, plaintiff and those on whose behalf this suit is brought have sustained damages, in the sum of $45,000.00, as nearly as the same can now be estimated, no part of which sum has been paid, although payment thereof has been duly demanded.

COMPLAINT

WHEREFORE, plaintiff prays:

1. That the S.S."TORONTO" be arrested;

2. That process issue against defendants, and that defendants be cited to appear and answer the allegations of the complaint.

3. That an interlocutory judgment be entered in favor of the plaintiff against the defendants directing that the plaintiff recover its damages and that the S.S. "TORONTO" be condemned and sold and the proceeds of the sale applied to the payment to plaintiff of the sum found due it;

4. That the amount due the plaintiff be computed by further proceedings before a Commissioner, pursuant to Rule 53(b), and/or by further proceedings before the Court, pursuant to Rule 42(b);

5. That final judgment against the defendants and the S.S"TORONTO" be entered, in favor of the plaintiff, for the amount due the plaintiff, with interest and with costs; and

6. That the plaintiff have such other and further relief as may be just.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff

By _____
A Member of the Firm

Office and P.O. Address
99 John Street
New York, New York, 10038
Telephone: 732-4646

COMPLAINT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

VINCENT L. LEIBELL, JR., being duly sworn, deposes and says:

That he is a member of the firm of BIGHAM ENGLAR JONES & HOUSTON, attorneys for plaintiff. That he has read the foregoing complaint, and that the same is true to the best of his knowledge, information and belief.

That the sources of deponent's information and grounds for his belief as to all matters are documents and correspondence relating to the matter in suit in possession of deponent's said firm.

That the reason this verification is made by deponent and not by plaintiff is that plaintiff is a corporation, none of whose officers are presently within this District.

Vincent L. Leibell Jr.

Sworn to before me this
[illegible] day of August, 1962

NOTARY PUBLIC

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ANSWER OF DEFENDANTS W. WILHELMSEN, BARBER STEAMSHIP LINES, INC., AND BARBER LINES A/S TO THE COMPLAINT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
1972 DEC 15 PM 12

. x

THE SPRAGUE & RHODES COMMODITY CORP., :

Plaintiff, :

-against- :

S.S. TORONTO, her engines, boilers, etc., :

-and against- :

WILH WILHELMSEN, and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S, :

Defendant. :

. x

ANSWER TO COMPLAINT

72C 3294 SJR

Defendants, Wilh Wilhelmsen, Barber Steamship Lines, Inc., and Barber Lines A/S., by its attorneys Haight, Gardner, Poor & Havens, alleges upon information and belief as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 of the Complaint.

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 2 of the Complaint.

ANSWER OF DEFENDANTS W. WILHELMSEN, BARBER STEAMSHIP LINES, INC., AND BARBER LINES A/S TO THE COMPLAINT

THIRD: Admits that at all times hereinafter mentioned, defendant, Wilh Wilhelmsen, is a corporation, or organization existing as a legal entity, under the laws of the Kingdom of Norway, with an office for the transaction of business in the City of Tonsberg, Norway, and, at all times hereinafter mentioned, was the owner of the S.S. "TORONTO".

FOURTH: Admits, that defendant, Barber Steamship Lines, Inc., is a corporation, existing as a legal entity, under the laws of the State of New York, with an office for the regular transaction of business at No. 17 Battery Place, in the Borough of Manhattan, City, County and State of New York, and Barber Lines A/S is a corporation, or organization existing as a legal entity under the laws of a foreign country and defendant, Barber Lines A/S were the charterer of the S.S. "TORONTO" and operated said vessel for the carriage of goods by water for hire, between Ports of Assab, Ethiopia, and New York, New York, but except as so specifically admitted, denies each and every allegation contained in paragraph 4 of the Complaint.

FIFTH: Admits that on the 2nd day of August, 1971, A. Besse & Co., (Ethiopia) S.C., Addis Ababa, as cosignor/shipper delivered to the vessel at the Port of Assab,

ANSWER OF DEFENDANTS W. WILHELMSEN, BARBER STEAMSHIP LINES, INC., AND BARBER LINES A/S TO THE COMPLAINT

Ethiopia, 2099 bags said to contain Gimbi Handpicked Coffee, U.G.Q. for transportation aboard the S.S. "TORONTO" to the Port of New York, New York, option Baltimore, Maryland, and delivery there in consideration of an agreed freight rate and pursuant to the valid terms of bills of lading, Nos. 5 and 6, dated Assab, Ethiopia, August 2nd, 1971, but except as so specifically admitted, denies each and every allegation contained in paragraph 5 of the Complaint.

SIXTH: Defendant, Barber Lines A/S, caused said goods, to be laden on board the S.S. "TORONTO" and on or about September 4, 1971, the S.S. "TORONTO" arrived at pier 9A, Port Authority Terminal, Brooklyn, New York, and delivered there the aforementioned shipment of Gimbi Handpicked Coffee, U.G.Q. under the aforementioned bills of lading, but except as so specifically admitted, denies each and every allegation contained in paragraph 6 of the Complaint.

SEVENTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 7 of the Complaint.

EIGHTH: Denies each and every allegation contained in paragraph EIGHTH of the Complaint.

ANSWER OF DEFENDANTS W. WILHELMSEN, BARBER STEAMSHIP LINES, INC., AND BARBER LINES A/S TO THE COMPLAINT

NINTH: Denies each and every allegation contained in paragraph NINTH of the Complaint.

FURTHER ANSWERING THE COMPLAINT AND FOR A FIRST, SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF AS FOLLOWS:

TENTH: Repeats and realleges each and every admission, denial, and denial of knowledge or information contained in paragraphs FIRST through NINTH, inclusive, of this Answer, with the same force and effect as if herein set forth at length.

ELEVENTH: The said shipment as hereinbefore described in this Answer to the Complaint was subject to all the terms, conditions, and exceptions contained in certain bills of lading, then and there issued therefor by which the shippers and consignees of said bills of lading agreed to be and are bound.

TWELFTH: Said shipment was transported on the vessel subject to the contractual terms and conditions of the bills of lading.

Any shortage, loss and/or damage to the goods, was due to causes for which the ship is not liable or responsible by virtue of the provisions of the Carriage of Goods by Sea Act, and/or applicable tariffs, and/or the provisions of the said bills of lading and/or the General Maritime Law.

ANSWER OF DEFENDANTS W. WILHELMSEN, BARBER STEAMSHIP LINES, INC., AND BARBER LINES A/S TO THE COMPLAINT

THIRTEENTH: Due diligence was exercised to make the vessel seaworthy with respect to the voyage referred to in the Complaint, and the said vessel was, in fact, seaworthy for said voyage.

AS AND FOR A SECOND SEPARATE AND/OR COMPLETE DEFENSE ON BEHALF OF DEFENDANT BARBER STEAMSHIP LINES INC., SAID DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

FOURTEENTH: That at all times mentioned in the Complaint Barber Steamship Lines, Inc., acted as agent for disclosed principals.

WHEREFORE, defendants demand judgment dismissing the Complaint herein, together with costs and disbursements of this action.

Dated: New York, New York

October 13, 1972.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants

By Peter S. Cowan
A Member of the Firm
One State Street Plaza
New York, New York

THIRD-PARTY COMPLAINT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP., Plaintiff, -against- S.S. "TORONTO", her engines, boilers, etc., -and against- WILH WILHELMSEN, and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/B, Defendants and Third Party Plaintiffs, -and against- PITTSTON STEVEDORING CORP., Third Party Defendant.	:	THIRD PARTY COMPLAINT 72 CIV. 3204 SJR

Defendants and Third party plaintiffs, S.S. Toronto, Wilh Wilhelmsen, Barber Steamship Lines, Inc., and Barber Lines A/B, by their attorneys, Haight, Gardner, Poor & Havens, complaining of the above named third party defendant, alleges upon information and belief, as follows:

FIRST: This is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

THIRD-PARTY COMPLAINT

SECOND: On or about August 3, 1972, a Complaint was filed in the United States District Court for the Southern District of New York by The Sprague & Rhodes Commodity Corp., against the S.S. Toronto and Wilh Wilhelmsen, Barber Steamship Lines, Inc., and Barber Lines A/B to recover $45,000.00 for the alleged shortage and non-delivery of bags of coffee carried on the S.S. Toronto from Assab, Ethiopia to the port of New York. A copy of the Complaint is annexed hereto and marked as Exhibit "A".

THIRD: At the time the cargo mentioned in the Complaint was discharged from the vessel, third party defendant Pittston Stevedoring Corp., agreed to furnish stevedoring service to the S.S. Toronto, including discharging and caring for the shipment in suit.

FOURTH: If the shipment in suit was lost as alleged by plaintiff, such loss occurred while the goods were in the care, custody and control of third party defendant, Pittston Stevedoring Corp.

FIFTH: If the plaintiff suffered damages as alleged in the Complaint, the same are improperly attributed to the acts of defendant and third party plaintiff, but were actually caused by the fault, neglect,

THIRD-PARTY COMPLAINT

act or omission of the third party defendant, and in violation of Pittston's warranty to perform its service in a workmanlike manner.

SIXTH: By reason of the aforesaid, third party defendant is primarily liable for any and all damage sustained by the plaintiff and said third party defendant is obligated to indemnify the third party plaintiff for any and all damages that may be imposed upon them by reason of the occurrences described in plaintiff's Complaint.

WHEREFORE, defendants and third party plaintiffs, demand judgment against the third party defendant for all such sums which may be recovered by the plaintiff against defendants and third party plaintiffs in this action, together with reasonable counsel fees, costs and disbursements of this action.

Dated: New York, New York
March 15, 1973

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants
and Third Party Plaintiffs

By Leroy S. Poza
A Member of the Firm
One State Street Plaza
New York, New York 10004

EXHIBIT A, ANNEXED TO THIRD-PARTY COMPLAINT--COMPLAINT.

(Same as Complaint reproduced, *supra*, pp. 4a to 8a.)

ANSWER TO THIRD-PARTY COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

WILH WILHELMSEN, and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/B,

Defendants and Third Party Plaintiffs,

-and against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

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72 CIV. 3294 SJR

ANSWER TO THIRD PARTY COMPLAINT

Third party defendant, Pittston Stevedoring Corp., by its attorneys, SYMMERS, FISH & WARNER, alleges on information and belief as follows:

IN ANSWER TO THE COMPLAINT

It denies knowledge or information sufficient to form a belief as to the allegations contained in the complaint.

IN ANSWER TO THE THIRD PARTY COMPLAINT

FIRST: It admits the allegations contained in paragraph FIRST of the third party complaint.

ANSWER TO THIRD-PARTY COMPLAINT

SECOND: It denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND of the third party complaint.

THIRD: In answer to paragraph THIRD of the third party complaint, it admits that at the time the cargo mentioned in the complaint was discharged from the vessel, third party defendant agreed to furnish stevedoring services to the SS TORONTO, pursuant to the terms and conditions of the agreement therefore; except as so admitted, it denies the allegations contained in said paragraph.

FOURTH: It denies the allegations contained in paragraph FOURTH of the third party complaint.

FIFTH: It denies the allegations contained in paragraph FIFTH of the third party complaint.

SIXTH: It denies the allegations contained in paragraph SIXTH of the third party complaint.

AS AND FOR A FIRST DEFENSE

SEVENTH: Third party defendant Pittston Stevedoring Corp. was not the owner or charterer of the SS TORONTO, but it was and is a beneficiary under the contracts of carriage or bills of lading under which the said bags of coffee were shipped, and as such is entitled to the rights, privileges and immunities of the United States Carriage of Goods by Sea Act of 16 April 1936, Title 46 U.S.C. §1300-1315, and the contracts of carriage or bills of lading issued in respect of said shipments.

ANSWER TO THIRD-PARTY COMPLAINT

EIGHTH: If any damage was sustained by the shipments of bags of coffee in question, it was caused by insufficient packing or other excepted cause provided in the United States Carriage of Goods by Sea Act of 16 April 1936, Title 46 U.S.C. §1300-1315, particularly §1304 (2) a, b, c, d, i, m, n, o, p and q thereof, and the contract of carriage embodied in the bills of lading issued in respect of such shipment.

AS AND FOR A SECOND DEFENSE

NINTH: It repeats and reiterates with the same force and effect as if herein set forth at length its allegations in Paragraph SEVENTH of this answer.

TENTH: If any damage was sustained by the shipments of bags of coffee in question, it was not caused by or contributed to by the third party defendant, Pittston Stevedoring Corp.

AS AND FOR A THIRD DEFENSE

ELEVENTH: It repeats and reiterates with the same force and effect as if herein set forth at length its allegations of Paragraph SEVENTH of this answer.

TWELFTH: At the time suit was commenced in this action or at the time when any loss or damage was sustained by the bags of coffee in question, or at any other material time, the plaintiff herein was not the real party in interest and this action was not commenced pursuant to proper authority or subrogation perfected within the Statute of Limitations' time period.

ANSWER TO THIRD-PARTY COMPLAINT

AS AND FOR A FOURTH DEFENSE

THIRTEENTH: The third party complaint fails to state a cause of action against this third party defendant upon which relief can be granted.

AS AND FOR A FIFTH COMPLETE OR PARTIAL DEFENSE

FOURTEENTH: Defendants and third party plaintiffs for a valuable consideration duly executed and delivered to third party defendant a general release in writing whereby defendants and third party plaintiffs duly released the third party defendant and forever discharged it from the alleged claim set forth in the third party complaint.

AS AND FOR A COUNTERCLAIM AGAINST DEFENDANTS AND THIRD PARTY PLAINTIFFS, THIRD PARTY DEFENDANT PITTSTON STEVEDORING CORP. ALLEGES ON INFORMATION AND BELIEF

FIFTEENTH: It repeats and reiterates with the same force and effect as if herein set forth at length its allegations contained in Paragraphs FIRST through SIXTH of this answer.

SIXTEENTH: This is a case of admiralty and maritime jurisdiction and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

SEVENTEENTH: That at all times mentioned herein, the defendants and third party plaintiffs were the owners and/or charterers and operators of the SS TORONTO.

ANSWER TO THIRD-PARTY COMPLAINT

EIGHTEENTH: If it be found that any loss or damage was sustained by the shipments in question while on board or while being discharged from the SS TORONTO, due to the manner of loading, stowing or discharging the cargo, then said loss or damage was the responsibility of the owner and/or charterers and operators of the vessel and was not caused by Pittston Stevedoring Corp. and Pittston Stevedoring Corp. is entitled to be indemnified by defendants and third party plaintiffs for any liability imposed on it herein.

WHEREFORE, third party defendant Pittston Stevedoring Corp. prays that the third party complaint herein be dismissed as against it, with costs, and said third party defendant further prays:

1. That process in due form of law according to the practice of this Court may issue against defendants and third party plaintiffs with reference to the counterclaim against them.

2. That third party defendant Pittston Stevedoring Corp. may have such other and further relief as to the Court may seem just and proper.

Dated: New York, New York

JUN 2[illegible] [illegible]

SYMMERS, FISH & WARNER

BY: William Warner

Member of the Firm
Attorneys for Third Party
Defendant, Pittston Stevedoring
Corporation
Office and Post Office Address
345 Park Avenue
New York, New York 10022

ANSWER TO THIRD-PARTY COMPLAINT

TO:
Messrs. Haight, Gardner, Poor & Havens
Attorneys for Defendants
and Third Party Plaintiffs
1 State Street Plaza
New York, New York 10004

Messrs. Bigham, Englar, Jones & Houston
Attorneys for Plaintiff
99 John Street
New York, New York 10038

INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against- 72 Civ. 3294 SJR

WILH WILHELMSEN, and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/B,

Defendants and
Third Party Plaintiffs,

-and against-

PITTSTON STEVEDORING CORP.,

Third Party Defendants.

INTERROGATORIES PROPOUNDED BY THIRD PARTY DEFENDANT, PITTSTON STEVEDORING CORP., TO BE ANSWERED UNDER OATH BY PLAINTIFF

PLEASE TAKE NOTICE that these interrogatories shall be deemed continuing so as to require supplementary answers if the plaintiff obtains additional information of the character called for by the interrogatories between the time the answers to the interrogatories herein are served and the date of trial.

INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF

When "records" are referred to in these interrogatories, it means all matter in written, printed, typed or other form on the subject of the interrogatory to the knowledge or information of the plaintiff and those acting for it.

1. Set forth the names and addresses of the officers of plaintiff at the time of the shipment in question.

2. Set forth the monetary interest plaintiff has in the claim and the monetary interest which any other individual, corporation or insurance company has in the claim.

3. Set forth the names and addresses of all parties who had, have now, or may later have an interest in this claim, i.e., the names and addresses of the parties whose interests plaintiff claims to represent in the complaint.

4. Set forth the name and address of the party who owned the shipment at the time it was loaded aboard the vessel.

5. Set forth the name and address of the party who owned the shipment at the time it was delivered by the vessel at the port of discharge.

6. State when and where and by what means plaintiff became the owner of the shipment in suit.

7. State in detail how the sum alleged in the ad damnum clause of the complaint is computed.

INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF

8. Set forth the type and extent of damage or loss sustained by the shipment identifying the damaged or non-delivered packages by marks and numbers.

9. Set forth:

(a) When, where and by whom the damage or non-delivery listed in the answer to the previous interrogatory was ascertained.

(b) The documentary evidence in support thereof.

10. Describe what records were kept which show:

(a) The condition and tally of the shipment at the time of arrival;

(b) What inspections were made after the shipment arrived;

(c) The names and addresses of the persons who inspected the shipment after it arrived, and

(d) The dates and places where the various inspections were made.

11. Set forth the name and address of the person who handled the purchase of the shipment on behalf of the plaintiff.

12. State when the shipment was ordered from the shipper and describe the documentary evidence thereof.

13. State whether the shipper was to pack the shipment, or if not, who in fact did pack the shipment into the packages or units.

14. Set forth in detail how each item of the shipment was packaged giving:

(a) The type of covering material on each package, if any, its weight, thickness and resistance to the elements;

INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF

(b) Dimensions of each package;

(c) Size, color and permanence of markings.

15. Set forth the terms and conditions of the contracts of carriage and any addendum thereto, or you may attach copies thereof to your answers.

16. With reference to plaintiff's complaint, state by bill of lading number, marks, etc., each unit which is claimed to have been damaged or non-delivered, the invoice value of the contents of each such package, and the extent to which the contents of each package is claimed to have been damaged, if damage is claimed.

17. State the ultimate disposition of the cargo which was received by plaintiff ex the vessel.

(a) If the cargo was sold, state the name of the purchaser or purchasers and the amount for which the cargo or portions thereof were sold and the date of sale.

(b) State any additional or extraordinary expenses, if any, incurred by plaintiff in the sale or other disposition of the shipment in suit, giving full particulars and amounts.

(c) If the cargo was not sold, state the present location of the shipment, giving such particulars as to permit inspection thereof.

18. Set forth:

(a) The value F.O.B. of the cargo in suit delivered to the vessel at the time of such delivery at the port of loading;

(b) The price for which plaintiff purchased the cargo;

INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF

(c) The labor and any other charges or expenses incurred by plaintiff in repairing and/or repacking the shipment in suit;

(d) Whether plaintiff or any of its subsidiaries are in the business of processing the items comprising the shipment in suit.

19. State whether the cargo, which is the subject of this suit was insured by plaintiff or anyone acting on its behalf or interest, against loss, damage or other perils from the time it left the port of loading until it was delivered. If your answer is in the affirmative:

(a) State who purchased the insurance;

(b) State whether a claim was ever made to the insurance company under the policy of insurance;

(c) If plaintiff or anyone else obtained a recovery under the terms of this policy, state the amount recovered, the date recovery was made from the insurance company, and whether a subrogation agreement or loan receipt was given in return for the proceeds of the insurance settlement;

(d) State whether the claim was declined by the insurance company, and if so, for what reason;

(e) Describe the terms of the insurance policy or append a copy of the insurance agreement to your answers.

NOTE: The foregoing are asked in order to learn the identity of the real party in interest in this lawsuit;

INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF

20. State whether an agent or an officer of plaintiff inspected the cargo in suit either before loading onto the vessel or after discharge from the vessel and whether any reports or surveys were made at any time; if so, please set forth the name and address of such officer or agent, the date of the report and the name and address of the present custodian of such report.

21. (a) State where the shipment referred to in the complaint remained from the time the items were packed until the time they were placed on board the vessel, setting forth the date and length of time the shipment remained in each place and the name and address of each custodian;

(b) Describe fully the means of transportation used to move the shipment in question, from the time the cargo was shipped from the place of origin to the time it was delivered to the vessel.

22. State whether any exceptions to the condition of the shipment in suit were noted between the point of origin and delivery aboard the vessel. If so, give the particulars thereof.

23. (a) If it is claimed that the defendants, their agent or servants were at fault or negligent with respect to the loading of said shipment, state in what respect.

(b) State whether or not there was a representative of the shipper present at the time that the shipment was loaded and/or discharged. If so, set forth the name and address of such representative,

24. If it is claimed that the defendants, their agent or servants were at fault or negligent with respect to the stowage and care of the shipment, state in what respect or respects.

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INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF

25. If it is claimed that the defendants, their agent or servants were at fault with respect to the discharging of the shipment in suit, state in what respect or respects.

26. Describe fully all shipping documents, banking documents, correspondence, communications and other written data which passed between the shipper, consignee and any other party in interest concerning the shipment in suit.

27. State what exceptions, if any, were taken at the time of delivery of the shipment in suit at destination.

28. State whether it is claimed that the shipper gave the defendants any special instructions or directions with respect to the stowage and handling of the shipment in suit. If so, set forth the content of these special directions or instructions and how plaintiff claims defendants failed to comply, if it is so claimed.

29. If any customs duties were paid upon the shipment in suit, describe any documentary evidence thereof.

30. If any items of the shipment were photographed after discharge from the vessel, state when, where and by whom they were photographed.

31. If any items of the shipment were photographed before loading aboard the vessel, state when, where and by whom they were photographed.

32. State what is the percentage of normal loss experienced by plaintiff on like shipments.

INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF

33. Give the names and addresses of all persons from whom statements concerning the alleged shipment in suit have been obtained; state whether each is oral or written, and state whether each was given before or after the commencement of this suit.

34. State when, where and by whom and to whom notice of claim on the plaintiff's behalf was given to the defendants; set forth the contents of such notice of claim or attach a true copy thereof.

35. State whether or not the plaintiff, or anyone on its behalf requested from the defendants, the charterer, the shipowner, or anyone else an extension of suit time; if the answer is in the affirmative, set forth the terms of any extension, or attach a true copy thereof.

36. (a) Is it claimed that third party defendant Pittston Stevedoring Corp., was negligent with respect to the discharge of the cargo or its subsequent handling thereafter;

(b) If so, state in what respect or respects;

(c) Set forth documentary evidence, if any, relating to such claim, if any;

INTERROGATORIES PROPOUNDED BY THIRD-PARTY DEFENDANT TO PLAINTIFF

(d) State when, where, by whom and to whom notice of claim, if any, was given on the plaintiff's behalf to third party defendant, Pittston Stevedoring Corp.: set forth the contents of such notice of claim or attach a true copy thereof.

Dated: New York, New York
AUG 2 1973

SYMMERS, FISH & WARNER

BY: _____
Member of the Firm
Attorneys for Third-Party Defendant,
Pittston Stevedoring Corp.
Office and P.O. Address
345 Park Avenue
New York, New York 10022

TO:

MESSRS. BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff
Office and Post Office Address
99 John Street
New York, New York 10038

MESSRS. HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants and Third-Party Plaintiffs
Office and Post Office Address
One State Street Plaza
New York, New York 10004

THIRD-PARTY DEFENDANT'S NOTICE OF MOTION RE SUMMARY JUDGMENT, FILED 27 DECEMBER, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

72 Civ. 3294 SJR

WILH. WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/B,

Defendants and
Third Party Plaintiffs,

-and against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

PLEASE TAKE NOTICE that upon the annexed affidavit of WILLIAM WARNER, sworn to the 21st of December 1973, the third party complaint and the answer thereto, the release dated 13 November 1972, copies of which are annexed hereto, and the Statement pursuant to General Rule 9(g) of this Court, third party defendant Pittston Stevedoring Corp. on 24 January 1974 at 10:00 A.M. in Room 129 will move this Court, the Hon. Sylvester J. Ryan, to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the

THIRD-PARTY DEFENDANT'S NOTICE OF MOTION RE SUMMARY JUDGMENT, FILED 27 DECEMBER, 1973

third party defendant's favor, on the ground that there is no genuine issue as to any material fact and that the third party defendant is entitled to a judgment as a matter of law.

Dated: New York, N. Y.

SYMMERS, FISH & WARNER

BY: WILLIAM WARNER
Member of the Firm
Attorneys for Third-Party Defendant,
Pittston Stevedoring Corp.
Office and P.O. Address
345 Park Avenue
New York, New York 10022

TO:

MESSRS. HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants and Third-Party Plaintiffs
Office and Post Office Address
One State Street Plaza
New York, New York 10004

MESSRS. BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff
Office and Post Office Address
99 John Street
New York, New York 10038

STATEMENT PURSUANT TO GENERAL RULE 9(g) OF THIS COURT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

72 Civ. 3294 SJR

WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/B,

Defendants and
Third Party Plaintiffs,

-and against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

STATEMENT PURSUANT TO GENERAL RULE
9(g) OF THIS COURT

Third Party Defendant, Pittston Stevedoring Corp., contends that there is no genuine issue to be tried as to the material fact that Defendants, Third Party Plaintiffs, with full knowledge of plaintiff's

STATEMENT PURSUANT TO GENERAL RULE 9(g) OF THIS COURT

claim, executed a general release, releasing Pittston Stevedoring Corp. from any and all liability for the claim which is the subject of this action.

Dated. New York, N. Y.

SYMMERS, FISH & WARNER

BY: [illegible]
Member of the Firm
Attorneys for Third-Party Defendant,
Pittston Stevedoring Corp.
Office and P.O. Address
345 Park Avenue
New York, New York 10022

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AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

72 Civ. 3294 SJR

WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/B,

Defendants and
Third Party Plaintiffs,

-and against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

WILLIAM WARNER, being duly sworn, deposes and says:

He is a member of the firm of SYMMERS, FISH & WARNER, attorneys for third party defendant Pittston Stevedoring Corp., is familiar with all the pleadings and proceedings heretofore had herein, and makes this affidavit in support of a motion for summary judgment in favor of third party defendant.

Action herein was instituted against the vessel and her owners on or about 2 August 1972, seeking recovery of $45,000 for shortage and non-delivery of coffee shipped from Assab, Ethiopia on the SS TORONTO, under Bills of Lading dated

AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

August 2, 1971, and allegedly short delivered at Brooklyn, New York on 4 September 1971. On or about 9 April 1973 defendant shipowners filed a third party complaint against the discharging stevedore, Pittston Stevedoring Corp., hereinafter called "Pittston", on an indemnity theory, alleging that damages, if any, were actually caused by the fault, neglect, act or omission of the third party defendant and in violation of Pittston's warranty to perform its services in a workmanlike manner.

In its answer to the third party complaint Pittston, among other defenses, asserted that defendants and third party plaintiffs for a valuable consideration had executed and delivered to third party defendant a general release in writing whereby defendants and third party plaintiffs duly released the third party defendant and forever discharged it from the alleged claim set forth in the third party complaint.

The release, dated 13 November 1972, copy of which is attached hereto, was entered into more than three months after the institution of plaintiff's action. It recites the consideration paid and specifically releases Pittston by reason of

> "any damage or loss to the shipments of cargo included in the attached list, marked "Exhibit A", and any other cargo claims filed against Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager, Klavenness, A.F. & Co., A/S up to November 13, 1972," (page 2 of Release, Exhibit 3)

WHEREFORE, it is respectfully requested that a summary judgment be entered in favor of third party defendant Pittston Stevedoring Corporation and that

AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

the third party complaint be dismissed as against it, with prejudice, and that it may have such other and further relief as to the Court may seem just in the premises

Sworn to before me this

WILLIAM WARNER

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF WILLIAM WARNER--THIRD-PARTY COMPLAINT AND ORIGINAL COMPLAINT.

(Reproduced, *supra*, pp. 14a to 16a and pp. 4a to 8a.)

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF WILLIAM WARNER--ANSWER TO THIRD-PARTY COMPLAINT.

(Reproduced, *supra*, pp. 18a to 23a.)

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF WILLIAM WARNER--
RELEASE, DATED 13 NOVEMBER, 1972.

RELEASE

TO ALL OF WHOM THESE PRESENTS SHALL COME TO OR MAY CONCERN.

GREETING: : KNOW YE, That Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager, Klaveness, A.F. & Co., A/S, for and in consideration of the sum of FORTY SIX THOUSAND THREE HUNDRED THIRTY NINE DOLLARS, ($46,339), lawful money of the United States of America, to it in hand paid by

PITTSTON STEVEDORING CORP.,

the receipt whereof is hereby acknowledged, has remised, released and forever discharged and by these presents does for itself, its successors and assigns, remise, release and forever discharge the said

PITTSTON STEVEDORING CORP., its

successors and assigns, owners, agents, underwriters, their successors and assigns from all manner of actions, cause of action, suits, debts, controversies, agreements, judgments, claims and demands whatsoever in any case of a civil nature whether at law, in equity or in admiralty, which against the said

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF WILLIAM WARNER

PITTSTON STEVEDORING CORP., their

successors and assigns, as foresaid, it ever had, now has or which it, its successors or assigns, hereafter can shall or may have, arising by reason of:

> any damage or loss to the shipments of cargo included in the attached list, marked "Exhibit A", and any other cargo claims filed against Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager, Klaveness, A.F. & Co., A/S up to November 13, 1972,

and the said Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager, Klaveness, A.F. & Co., A/S, warrants that they are the parties entitled to receive the said sum of $46,339, and in further consideration of said payment it hereby agrees to indemnify, defend and hold harmless the said

PITTSTON STEVEDORING CORP., their

successors and assigns, its owners, etc., as aforesaid, up to the amount of the payment set forth above from and

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF WILLIAM WARNER

against any claims, demands, suits or actions made or brought against them by any third party by reason of the loss or damage to shipment referred to on the attached list.

IN WITNESS WHEREOF, Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager, Klaveness, A.F. & Co., A/S, has caused these presents to be executed by their duly appointed attorneys on the 13th day of November, one thousand nine hundred and seventy-two.

Signed in the presence of:

HAIGHT, GARDNER, POOR & HAVENS
As Attorneys for Barber Steamship
Lines, Inc., Barber Lines, A/S
Wilh Wilhelmsen, Fearnley & Eager
Klaveness, A.F. & Co., A/S

By

A Member of the Firm
One State Street Plaza
New York, New York 10004

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF WILLIAM WARNER

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the 13th day of November, in the year One Thousand Nine Hundred and Seventy-Two, before me personally came M. E. DeOrchis, to me known, who, being duly sworn by me, did depose and say that he resides at 19 Shore Drive, Great Neck, and is a member of the firm of Haight, Gardner, Poor & Havens, attorneys for Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager, Klaveness, A.F. & Co., A/S, and is authorized by the above named releasors to sign this for an on their behalf.

Marguerite F. Zanello

MARGUERITE F. ZANELLO
Notary Public, State of New York
No. [illegible]
Qualified in Westchester County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1974

EXHIBIT 3 (CONTINUED)--EXHIBIT A, ATTACHED TO RELEASE--
DAMAGE OR LOSS TO SHIPMENTS OF CARGO.

	SHIP/VOYAGE	File #	AMOUNT CLAIMED	SETTLEMENT
1.	TRAVIATA-VOY. 5121	72-129	732.00	Not cargo-not discussed
2.	TAI PING-VOY. 8061	72-63	500.00	500.00
3.	TEMERAIRE-VOY. 8001	196-69	500.00	500.00
4.	TOREADOR-VOY. 31B	165-66	224.94	112.00
5.	TURANDOT-VOY. 19B	267-65	3,661.50	1,800.00
6.	TARANTEL-VOY. 11B	207-64	2,926.60	2,500.00 previously paid
7.	TYR-VOY. 2A	153-68	1,070.44	1,070.44
8.	TOREADOR-VOY. 31A	212-66	250.00	100.00
9.	TEMA-VOY. 17A	191-67	1,533.36	750.00
10.	TITANIA-VOY. 16A	167-64	2,130.32	------
11.	FERNLAND-VOY. 12A	456-68	206.28	206.28
12.	TEMERAIRE-VOY. 5090	71-249	500.00	250.00
13.	TORTUGAS-VOY. 3063	72-19	816.37	816.37
14.	TEMERAIRE-VOY. 5090	71-243	742.00	371.00
15.	TAI PING-VOY. 5103	71-275	626.14	600.00
16.	TAI PING-VOY. 5088	71-254	2,483.08	2,483.08
17.	TORTUGAS-VOY. 3063	72-130	55.14	25.00
18.	TAI PING-VOY. 8043	71-161	12,697.77	6,348.88
19.	FLORISTAN-VOY. 8044	71-162	5,996.80	4,000.00
20.	FLORISTAN-VOY. 8044	71-375	17,400.24	11,000.00
21.	FERNGATE-VOY. 6037	72-35	7,569.20	1,000.00

BEST COPY AVAILABLE

EXHIBIT 3 (CONTINUED)

	SHIP/VOYAGE		AMOUNT CLAIMED	SETTLEMENT
22.	ST. CONSTANTINE-VOY. 6037	72-139	73.50	36.75
23.	ROSEVILLE-VOY. 5104	72-138	43.53	21.77
24.	TRAVIATA-VOY. 5109	72-141	366.47	183.23
25.	FERNWAVE-VOY. 11A	124-66	536.10	260.00
26.	FERNGATE-VOY. 6021	70-258	753.46	650.00
27.	KINGSVILLE-VOY. 31A	343-68	154.90	154.00
28.	FERNLAND-VOY. 5057	70-290	424.50	400.00
29.	QUEENSVILLE-VOY. 29A	387-67	206.35	------
30.	FERNCLIFF-VOY. 23A	165-64	763.51	350.00
31.	FERNBROOK-VOY. 24A	210-64	1,056.18	500.00
32.	CORNEVILLE-VOY. 18A	164-63	3,506.52	------
33.	FERNCLIFF-VOY. 23A	169-64	2,397.95	------
34.	IOANNA-VOY. 3B	193-68	139.02	100.00
35.	FERNWOOD-VOY. 1A	590-67	4,247.34	4,247.34
36.	CORNEVILLE-VOY. 37B	462-68	500.00	500.00
37.	FERNGATE-VOY. 19B	49-69	284.89	100.00
38.	FERNBROOK-VOY. 18B	20-68	3,666.50	1,000.00
39.	QUEENSVILLE-VOY. 5031	14-70	1,502.00	1,502.00
40.	FERNGATE-VOY. 5080	71-129	310.05	155.03
41.	TORONTO-VOY. 3030	71-109	168.96	150.00
42.	NO VESSEL	72-140	------	No cargo involved
43.	JENS JOST-VOY. 3071	72-161	110.28	100.00
44.	TRAVIATA-VOY. 5109	72-267	827.75	413.87
45.	FERNSTATE-VOY. 5119	72-162	55.87	55.00

EXHIBIT 3 (CONTINUED)

	SHIP/VOYAGE		AMOUNT CLAIMED	SETTLEMENT
46	TARANTEL-VOY. 5118	72-163	62.64	62.00
47.	FERNLAND-VOY. 4079	72-84	1,509.43	1,500.00
48.	SHAHRISTAN-VOY. 3079	72-172	UNKNOWN	------
49.	TRAVIATA-VOY. 5109	72-210	358.74	179.00
50.	TAGAYTAY-VOY. 30B	455-69	2,220.00	934.96
51.	TARANTEL-VOY. 5094	71-325	70.20	35.00
52.	TRAVIATA-VOY. 5073	71-326	31.30	16.00

AFFIDAVIT OF M. E. DeORCHIS IN OPPOSITION TO THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP., Plaintiff, -against- S.S. "TORONTO", her engines, boilers, etc., -and against- WILH WILHELMSEN, BARBER STEAMSHIP LINES, INC., & BARBER LINES A/S Defendants & Third-Party Plaintiffs, -and against- PITTSTON STEVEDORING CORPORATION, Third-Party Defendant.	AFFIDAVIT 72 Civ. 3294 SJR

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

M. E. DeOrchis, being duly sworn, deposes and says that:

I am a member of the firm of Haight, Gardner, Poor & Havens, attorneys for defendants and third-party plaintiffs, Wilh Wilhelmsen, Barber Steamship Lines, Inc.,

AFFIDAVIT OF M. E. DeORCHIS IN OPPOSITION TO THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

and Barber Lines A/S, hereinafter referred to as Barber, and make this Affidavit in opposition to the motion of third-party defendant, Pittston Stevedoring Corporation, hereinafter referred to as Pittston, for Summary Judgment, returnable before the Honorable Sylvester J. Ryan at 10:00 A.M. on January 24, 1974 in room 129.

Material issues of fact with respect to the inclusion of the subject matter of this action into a release do exist, and have been set forth in the Rule 9(g) Statement attached to these papers.

Prior to November 13, 1972, your deponent represented Barber in the negotiations of claims initiated by Barber against Pittston for lost cargo. On November 13, 1972, Barber settled its claims and released Pittston for the negotiated claims listed in "Exhibit A" of the release. The stevedore requested that it also be released from any other claims Barber may have held against Pittston at that time. The following wording was included in the release to cover this request:

> . . . and any other cargo claims filed against Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager Klavenens, A.F. & Co., A/S up to November 13, 1972.

AFFIDAVIT OF M. E. DeORCHIS IN OPPOSITION TO THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The parties did not intend to make Barber an insurer of Pittston for any shortage claim a cargo owner might make against Pittston. Nor did the parties intend to exonerate Pittston for damages into which Barber might be cast if it was discovered after November 13, 1972, that the ultimate responsibility was Pittston's.

If the intent of the parties was as alleged by Pittston, the release would have included a hold harmless agreement necessary to obtain that intent. Since the release does not include a hold harmless agreement, its clear meaning cannot be that alleged by Pittston.

Mr. Warner correctly stated that the above entitled action for shortage of 781 bags of coffee was commenced against the ocean carrier on or about August 2, 1972. However, Barber's delivery information obtained from its stevedore, Pittston, indicated that no such shortage existed, and Barber rejected plaintiff's claim.

By a letter of February 20, 1973, a copy of which is annexed hereto as Exhibit A, plaintiff's attorneys were requested to submit documents to support what appeared to be a non-existent shortage.

On February 22, 1973, plaintiff's attorneys furnished your deponent's office with documents indicating that the cargo in suit was delivered from the s/s Toronto

AFFIDAVIT OF M. E. DeORCHIS IN OPPOSITION TO THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

to Pittston, but was not delivered by Pittston to plaintiff. Therefore, Pittston was impleaded as a party liable both directly to plaintiff and, in indemnity, to Barber.

Even if the release could be construed to eliminate Barber's indemnity claim against Pittston it could not be construed to eliminate plaintiff's claim against Pittston. As explained in Point II of Barber's Memorandum of Law opposing Summary Judgment, Rule 14(c) of the Federal Rules of Civil Procedure provides plaintiff with a direct claim against Pittston. Any release running from Barber to Pittston could not possibly release plaintiff's claim against Pittston.

Since the award of Summary Judgment would eliminate both Barber's indemnity claim and plaintiff's direct claim, Summary Judgment is not appropriate. Nor would it be equitable as it would afford Pittston's underwriters a "windfall" of $45,000. This is almost as much as Pittston paid for the numerous relatively small claims settled by the release!

No claim had been made against Pittston for the $45,000 and, of course, it was not discussed, for no such claim against Pittston existed at the time the listed claims were settled. The purpose of the general language was to cover claims against Pittston which Barber had in its files but might have overlooked. It

AFFIDAVIT OF M. E. DeORCHIS IN OPPOSITION TO THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

was included because Barber had found 4 more small claims in its files (Nos. 49-52 on Exhibit A attached to the release) at the last minute and the $45,000 first agreed upon was raised to $46,339. Obviously, if Pittston had not incorrectly reported to Barber that there was no shortage of 781 bags and if Barber had known that Pittston had also lost $45,000 worth of coffee, as claimed by plaintiff, the claim would have been discussed and a much larger settlement would have been reached by the parties.

WHEREFORE, it is respectfully requested that third-party defendant's motion for Summary Judgment be denied.

M. E. DeOrchis

Sworn to before me this
18th day of January, 1974.

Notary Public

STATEMENT OF MATERIAL FACTS AS TO WHICH A GENUINE TRIABLE ISSUE EXISTS, PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF SOUTHERN DISTRICT, ATTACHED TO AFFIDAVIT OF M. E. DeORCHIS.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,	:	
Plaintiff,	:	
-against-	:	
S.S. "TORONTO", her engines, boilers etc.,	:	
-and against-	:	
WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S,	:	72 Civ. 3294 SJR
Defendant and Third Party Plaintiffs,	:	
-and against-	:	
PITTSTON STEVEDORING CORP.,	:	
Third Party Defendant.	:	

STATEMENT OF MATERIAL FACTS AS TO WHICH A GENUINE TRIABLE ISSUE EXISTS, PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF SOUTHERN DISTRICT

Defendants and Third Party Plaintiffs, Wilh Wilhelmsen and Barber Steamship Lines, Inc., and Barber Lines A/S, contend that there is a genuine issue of fact

STATEMENT OF MATERIAL FACTS AS TO WHICH A GENUINE TRIABLE ISSUE EXISTS, PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF SOUTHERN DISTRICT, ATTACHED TO AFFIDAVIT OF M. E. DeORCHIS

to be tried concerning the inclusion of the subject matter of the above entitled action into the Release relied upon by Third Party Defendant.

Defendants and Third Party Plaintiffs contend that the parties to the Release did not intend the Release to cover the subject matter of the above entitled action and that said Release does not, in fact, cover the subject matter of the above entitled action.

Dated: New York, New York
January 18, 1974

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

By s/ [illegible]
A Member of the Firm
Attorneys for Defendants
& Third Party Plaintiffs
Wilh Wilhelmsen, Barber
Steamship Lines, Inc., &
Barber Lines, A/S
One State Street Plaza
New York, New York 10004

**EXHIBIT A, ANNEXED TO AFFIDAVIT OF M. E. DeORCHIS--
LETTER DATED FEBRUARY 20, 1973.**

February 20, 1973

Bigham, Englar, Jones & Houston
99 John Street
New York, New York 10038

Attention: J. Hart, Esq.

TORONTO - VOYAGE 3046
SHORTAGE OF COFFEE
B/L 5, 6, - $45,000
Our file 102-5884

Dear Sirs:

Our client indicates that the coffee in suit was delivered and they cannot understand the basis for the suit. Rather than have formal depositions and other discovery it would seem that you should be in a position to explain plaintiff's alleged loss and submit supporting documents.

This would seem to be a logical approach to eliminate some of the confusion.

Very truly yours,

HAIGHT, GARDNER, POOR & HAVENS

By

LSC:LLM

LeRoy S. Corsa

REPLY AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/B,

Defendants and Third Party Plaintiffs,

-and against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

----------X

72 Civ. 3294 SJR

REPLY AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK)

WILLIAM WARNER, being duly sworn, deposes and says that he is a member of the firm of SYMMERS, FISH & WARNER, attorneys for third party defendant Pittston Stevedoring Corp., and is familiar with all the pleadings and proceedings heretofore had herein.

REPLY AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION

1. This affidavit is submitted in reply to the affidavit of Mr. M. E. DeOrchis, dated 18 January 1974, and in support of the third party defendant's motion for summary judgment.

2. The ocean carrier in opposition to third party defendant's motion for summary judgment submits that a genuine issue of fact exists as to the inclusion in the release of the action now at bar. In support of this, no proof is offered other than the affidavit of Mr. De Orchis, who executed the release. The language of the release is clear and contrary to Mr. De Orchis' contention. The ocean carrier was aware that plaintiff herein had made a claim for loss of cargo under the pertinent bills of lading inasmuch as ocean carrier received a letter from plaintiff under date of 15 October 1971 (copy of which is attached as Exhibit "A"), and, in fact, furnished a copy of this letter to third party defendant's counsel in response to a notice for production of documents. Moreover, the complaint herein was served on or about 2 August 1972, a date well anteceding the date of the release, 13 November 1972. That plaintiff served a complaint claiming shortage clearly demonstrates that the plaintiff was serious in its intent to pursue its claim. Even if, as the ocean carrier claims, Pittston advised it that the entire shipment had been "delivered", the ocean carrier knew, or should have known, that plaintiff nevertheless claimed that it had not received the entire shipment and had brought suit before the release was executed.

REPLY AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION

3. The ocean carrier, in its opposition papers, brings in another argument against summary judgment--one that does not fall within the ambit of summary judgment since it deals merely with third-party procedure. It can be resolved by reading the third party complaint. The ocean carrier asserts that the release, if it were meant to include the present action, would cover only the indemnity action between defendants and third party plaintiffs on the one hand, and the third party defendant, on the other hand, and that it would not cover "plaintiff's direct Rule 14(c) action against third party defendant." A reading of the third party complaint (attached to the moving papers) shows that plaintiff has no direct Rule 14(c) action against third party defendant, because third party plaintiffs did not so pray. The third party complaint is couched in the usual "indemnity" language and there is no prayer for judgment against the third party defendant in favor of the plaintiff. Neither did plaintiff, after the service of the third party complaint, use the means provided by Rule 14(a) "to assert any claim made against the third party defendant arising out of the transaction or occurrence that is the subject matter of plaintiff's claim against the third party plaintiff."

4. The ocean carrier claims (page 3 of Mr. De Orchis' affidavit) that it learned on 22 February 1973 that shortage, if any, was caused not by the ocean carrier but by the stevedore. However, there is nothing de hors the affidavit of Mr. De Orchis to substantiate this. The claim of shortage had been continuously before the ocean carrier as far back as 15 October 1971, and was reiterated by the institution of suit on 2 August 1972.

REPLY AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION

5. In the opposing memorandum of law several cases are cited in support of the contention that the party opposing summary judgment is to be given the benefit of all reasonable doubt in determining whether a genuine fact issue exists. These cases are distinguishable in that in each of them the "fact issue" was nothing as unequivocal as a formal release prepared by the opposing party. India Supply Mission v. s/s Overseas Joyce, 246 F. Supp. 536, 538 (S.D.N.Y. 1965) dealt with the meaning of "customary freight unit" in a bill of lading (a locomotive). Adickes v. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1597, 26 F. Ed. 2d 142 (1970). was a case of discrimination and a count of conspiracy, and the issue of fact was whether or not there was a conspiracy. Cali v. Eastern Airlines, Inc., 442 F. 2d 65, 71 (2d Cir. 1971) was a patent infringement matter, and the genuine issue of fact was whether an airline publicly used an invention prior to a certain date. American Mfrs. M.I. Co. v. American Broadcasting Par. JH., 388 F. 2d 272, 279 (2d Cir. 1967) was an action for a declaratory judgment that a contract between a TV network and a group of insurnce companies for sponsorship of news programs was illegal and unenforceable under the Sherman Act. The 2nd Circuit reversed the summary judgment granted in Southern District in favor of the TV network, from which the insurance companies had appealed, the 2nd Circuit holding that affidavits, exhibitions and depositions raised substantial fact issues.

REPLY AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION

6. In the opposing memorandum of law, the ocean carrier's counsel categorizes the third party defendant's authorities as not in point because they "were not admiralty actions and were therefore, without the provisions of Rule 14(c) of the Federal Rules of Civil Procedure." (opposition memorandum, page 10) It has been pointed out above that the case at bar is also "outside" the provisions of Rule 14(c) inasmuch as third party plaintiffs did not request a judgment in favor of plaintiff against the third party defendant. 3 Moore's Federal Practice, Para.14.20 (1973 Cumulative Supplement Para. 14.20 at 44 and 45) cites several cases dealing with Rule 14(c). An examination of all of them reveals that a necessary ingredient is that the third party plaintiff demand judgment against the third party defendant in favor of the plaintiff. Van Nood v. Federal Barge Lines, Inc. (ED La 1968) 282 F. Supp 890, 893; Monarch Indus. Corp. v. American Motorists Ins. Co. (SD NY 1967) 276 F Supp 972, 982; Ohio River Co. v. Continental Grain Co. (ND Ill 1972) 352 F Supp 505, 512; Spearing v. Manhattan Oil Transportation Corp. (SD NY 1970) 317 F Supp 829, 831; and Bilkay Holding Corp. v. Consolidated Iron & Metal Co. (SD NY 1971) 330 F Supp 1313, 1316. At page 9 of its brief, the ocean carrier relies on inapposite cases where stevedores sought summary judgment on the theory that they were third party beneficiaries of a bill of lading which includes a one-year Statute of Limitation for the filing of suits. Reference is made to the memorandum

REPLY AFFIDAVIT OF WILLIAM WARNER IN SUPPORT OF THIRD-PARTY DEFENDANT'S MOTION

of law submitted in support of this motion at page 3 and 4 quoting 6 Moore's Federal Practice ¶56.17 [49], at page 2651 regarding a release as the basis for a motion for summary judgment. The ocean carrier has not and cannot claim that the release here is either legally insufficient, voidable because of mutual mistake, fraud or on some other material ground. The release should be taken at its face value and summary judgment granted to the third party defendant.

Sworn to before me this
23rd day of January 1974

Mary E. Culhane

MARY E. CULHANE, Notary Public
State of New York, No. 60-0618110
Qualified in Westchester County
Cert. Filed in New York County
Commission Expires March 30, 1975

William Warner

EXHIBIT A, ATTACHED TO REPLY AFFIDAVIT OF WILLIAM WARNER--
LETTER DATED 15 OCTOBER, 1971.

THE SPRAGUE & RHODES COMMODITY CORP.
NINETY-NINE WALL STREET
NEW YORK, N.Y. 10005

CABLES: SPRAGRODES

TELEPHONE: DI 4-8350

October 15, 1971

Barber Steamship Lines, Inc.
17 Battery Place
New York, N. Y. 10004

Attention Mr. Otis Herbert

Our Ref: #s. 1542-X / 1543-X
SS TORONTO - arrd. N. Y. 9/4/71
2099 Bags Ethiopian Coffee
B/L #s. 5 & 6, Assab
Ordered into Warehouse 9/23/71

Dear Mr. Herbert:

We have been advised by our weighers W. S. Force & Co., that 2,039 bags out of 2,099 bags on the above captioned shipment were weighed on the dock and supposedly picked up by Davidson Transfer & Storage Company for storage at Lehigh Distribution Center in Elizabeth, New Jersey.

We have made numerous attempts with all parties involved to determine as best possible how many bags were actually delivered to the warehouse to no avail. As of this date only 928 bags have been accounted for at the warehouse with the status of the balance still unknown.

EXHIBIT A, ATTACHED TO REPLY AFFIDAVIT OF WILLIAM WARNER

This matter has been reported to our underwriters and we are hereby notifying you of our intent to file claim and hold you responsible for any losses, damages and-or expenses which are determined to be for your account.

We would appreciate your further cooperation resolving this situation.

Yours very truly,

THE SPRAGUE & RHODES COMMODITY CORPORATION

PR/fb P. Rosario
c.c. Johnson & Higgins
Att: Bob Gardner

W. S. Force & Co.
A. Besse & Co.

Chefima (Ethiopia) Private Ltd. Co.
Registered mail R.R.R.

MEMORANDUM ENDORSED ON MOTION FILED 27 DECEMBER, 1973, FILED 8 MARCH, 1974.

U. S. D. C. FILED MAR 8 1974 S. D. OF N. Y.

THE SPRAGUE & RHODES COMMODITY CORP. v. SS TORONTO, etc. etal.

Endorsement
72 Civ. 3294

PITTSTON STEVEDORING CORP., the third party defendant herein, has moved for summary judgment under Rule 56, F.R.C.P., in its favor on the ground that there is no genuine issue of fact and that it is entitled to judgment as a matter of law.

The file and docket show that this suit was filed on August 2, 1972 against the defendant vessel "TORONTO" by the plaintiff, THE SPRAGUE & RHODES COMMODITY CORP. Plaintiff seeks in this action to recover a money judgment of $45,000 for damages for shortage and non-delivery of coffee shipped from Assab, Ethiopia, to Brooklyn, New York, under bills of lading dated August 2, 1971. This short delivery under this bill of lading is claimed to have occurred on September 4, 1971. The third party plaintiff, in its third party complaint, seeks to recover money judgment against the discharging stevedore, PITTSTON, upon the theory of indemnity, alleging that any and all damages were caused by the fault of PITTSTON and its failure to perform its services in a workmanlike manner.

To this claim, PITTSTON, in its answer, pleads in defense that the third party plaintiff gave its written general release to PITTSTON, a copy of which, dated November 13, 1972, is annexed to the answer. The execution and delivery of the release is not denied; the release, being a written document, is deemed in law to be given for full and valuable consideration and a reading of it shows that the release specifically relieves and discharges PITTSTON of any and all liability as listed in the release and this listing includes a release of the claim in suit.

MEMORANDUM ENDORSED ON MOTION FILED 27 DECEMBER, 1973,
FILED 8 MARCH, 1974

I have concluded that this motion to dismiss must be granted and judgment is directed to be entered by the Clerk forthwith, dismissing the complaint against the third party defendant with prejudice.

So ordered.

Dated: March 8, 1974.

SYLVESTER J. RYAN
U.S.D.J.

MAR 8 1974

JUDGMENT THAT THIRD-PARTY DEFENDANT HAVE JUDGMENT AGAINST THIRD-PARTY PLAINTIFFS, DISMISSING THIRD-PARTY COMPLAINT WITH PREJUDICE, FILED 11 MARCH, 1974.

FILED
MAR 11 1974
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

THE SPRAGUE & RHODES COMMODITY CORP., Plaintiff, : 72 Civil 3294(SJR)

-against- : JUDGMENT

S.S. "TORONTO", HER ENGINES, BOILERS, ETC., :

-and against-

WILH WILHELMSEN AND BARBER STEAMSHIP LINES, INC., AND BARBER LINES A/B, Defendants and Third-Party Plaintiffs, :

-against- :

PITTSTON STEVEDORING CORP., Third-Party Defendant.

- X

Third-party defendant having moved the Court for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, in its favor on the ground that there is no genuine issue of fact and that it is entitled to judgment as a matter of law, and the said motion having come on to be heard before the Honorable Sylvester J. Ryan, United States District Judge, and the Court thereafter on March 8, 1974, having handed down its memorandum endorsed granting

JUDGMENT THAT THIRD-PARTY DEFENDANT HAVE JUDGMENT AGAINST THIRD-PARTY PLAINTIFFS, DISMISSING THIRD-PARTY COMPLAINT WITH PREJUDICE, FILED 11 MARCH, 1974

the said motion, and directing the Clerk forthwith to enter judgment dismissing the complaint against the third-party defendant with prejudice, it is,

ORDERED, ADJUDGED AND DECREED, that third-party defendant, PITTSTON STEVEDORING CORP., have judgment against the defendant/third-party plaintiff, WILH WILHELMSEN AND BARBER STEAMSHIP LINES, INC., AND BARBER LINES A/B, dismissing the third-party complaint with prejudice.

Dated: New York, N. Y.
March 11, 1974

Clerk

DEFENDANT, THIRD-PARTY PLAINTIFFS' NOTICE OF MOTION FOR REARGUMENT RE SUMMARY JUDGMENT, FILED 19 MARCH, 1974.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP., Plaintiff, -against- S.S. "TORONTO", her engines, boilers, etc., -and against- WILH WILHWLMSEN, and BARBER STEAMSHIP LINES, INC., & BARBER LINES A/S, Defendants & Third party Plaintiffs, -and against- PITTSTON STEVEDORING CORPORATION, Third Party Defendant.	NOTICE OF MOTION FOR REARGUMENT 72 Civ. 3294 SJR

S I R S :

PLEASE TAKE NOTICE that pursuant to Rule 9(m) of the General Rules of the District Court for the Southern District of New York, the defendants and third party plaintiffs herein will move this Court before Hon. Sylvester J. Ryan, at a stated term for the hearing of this motion on the 28th day of March, 1974, at 10 o'clock on that date or as soon thereafter as counsel can be heard, in Room 2203 of the United States Courthouse,

DEFENDANT, THIRD-PARTY PLAINTIFFS' NOTICE OF MOTION FOR REARGUMENT RE SUMMARY JUDGMENT, FILED 19 MARCH, 1974

Foley Square, New York, New York for an Order granting reargument and reconsideration of a previous Order of this Court, dated March 8, 1974, granting the third party defendant's motion for Summary Judgment and for such other, further and different relief as to this Court may deem just and proper.

Please find attached a Memorandum setting forth the reasons why a Motion for Reargument should be granted.

Dated: New York, New York
March 18, 1974

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants
& Third Party Plaintiffs

By M. E. D'Oench
A Member of the Firm
One State Street Plaza
New York, New York 10004

TO:

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff
99 John Street
New York, New York 10038

SYMMERS, FISH & WARNER
Attorneys for Third Party Defendant
345 Park Avenue
New York, New York 10022

BEST COPY AVAILABLE

MEMORANDUM ENDORSED ON MOTION FILED 19 MARCH, 1974,
FILED 4 APRIL, 1974.

THE SPRAGUE & RHODES COMMODITY CORP. v. SS TORONTO, etc. etal

Endorsement
72 Civ. 3294

Motion to reargue is granted and, on reargument, the decision of the Court granting summary judgment to Third Party Defendant PITTSTON STEVEDORING CORPORATION is vacated.

Upon reconsideration of the release and the affidavits of counsel, it is clear that a genuine issue of fact exists as to the inclusion of the subject matter of the above entitled action in the release and a further question as to the right of defendant and third party defendant to cut off plaintiff's direct claim against the third party defendant (Rule 14(c)).

If the Clerk has entered judgment, he is directed to recall and cancel it.

So ordered.

DATED: April 3, 1974.

SYLVESTER J. RYAN,
U.S.D.J.

U. S. DISTRICT COURT
FILED
APR 4 1974
S. D. OF N. Y.

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

SS TORONTO, her engines, boilers, etc.,

-and against-

WILH WILHELMSEN, and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S,

Defendants and
Third-Party Plaintiffs,

-against-

PITTSTON STEVEDORING CORP.,
Third-Party
Defendant.

U.S. District Court
Filed
May 10 1976
S. D. N. Y.

PRE-TRIAL ORDER

72 Civ. 3294 ~~SJR~~
WCC

The attorneys for the parties to this action appeared before the Court at a pre-trial conference on March 5, 1976, pursuant to the provisions of the Federal Rules of Civil Procedure, and the following action was taken:

1. This Court has jurisdiction of the cause of action of all the parties herein.

2. The pleadings were agreed to be deemed supplemented, in accordance with the framing of the issues of this action, under Paragraph 8 of this pre-trial order.

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976

3. The parties agree that the trial of this action should be based upon this Order and pleadings, except that the following issues, raised by the pleadings, are expressly abandoned: NONE

4. The Plaintiff and the defendant, Barber Steamship Lines, Inc. agree to and contend the following facts:

(1) On August 2, 1971, Messrs. A. Besse and Co. (Ethiopia) S.C. of Addis Ababa Ethiopia, shipped a total of 2099 bags of "GIMBI" HANDPICKED COFFEE U.G.Q. under "Clean On-Board" Bills of Lading, Nos. 5 and 6, dated Assab, August 2, 1971. The weight on Bill of Lading No. 5 was "said to be 60,528.7 gross kos, net 59,880" and on Bill of Lading No. 6 the weight was "said to be 66,775.65 gross kos, net kos 66,060." These 2099 bags of "GIMBI" HANDPICKED COFFEE U.G.Q. was consigned to the order of Sprague & Rhodes Commodity Corp., 99 Wall Street, New York, New York, 10005, U.S.A.

(2) The S.S. "TORONTO" arrived at Pier 9A, Port Authority Terminal, Brooklyn, New York City, on September 4, 1971, and the 2099 bags of coffee were discharged by the Pittston Stevedoring Corporation.

(3) It is plaintiff's and defendant and third-party plaintiff's contentions:
That on August 2, 1971, at the port of Assab, Ethiopia, there was delivered to the S.S. "TORONTO" 2099 bags of "GIMBI" HANDPICKED COFFEE U.G.Q. by A. Besse & Co. (Ethiopia) Addis Ababa, Ethiopia, consigned to The Sprague & Rhodes Commodity Corporation, 99 Wall Street, New York, New York, 10005, aboard the S.S. "TORONTO", which was owned and

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976

operated by the defendant, Barber Steamship Lines, Inc. under "Homeward Bills of Lading", Nos. 5 and 6 (Clean on Board), dated Assab, August 2, 1971. The freight, according to the terms of the bills of lading, was "Payable at Destination". The S.S. "TORONTO", arrived at Pier 9A, Port Authority Terminal, Brooklyn, New York on, September 4, 1971 and delivered there the 2099 bags of "GIMBI" HAND-PICKED COFFEE. The total freight, on B/L No. 5 was $3,313.96 and, on B/L No. 6, $3,655.98 for a total of $6,969.94. The S.S. "TORONTO", upon arrival at Pier 9A, Brooklyn, New York, had engaged as its stevedore, Pittston Stevedoring Corporation.

(4) The bags of coffee were discharged and tallied, at Pier 9A, Brooklyn, New York, as follows:

Bill of Lading No. 5

1971		
September 27.	345	bags of coffee delivered.
September 28.	653	bags of coffee delivered.
TOTAL	998	bags of coffee discharged and delivered to third-party defendant

(5) There was a full and complete delivery under Bill of Lading, No. 5 to third-party defendant.

Bill of Lading No. 6

1971		
September 27.	655	bags of coffee delivered.
September 28.	440	bags of coffee delivered.
	1,095	bags of coffee delivered.
	6	bags of coffee "Short".
TOTAL	1,101	bags of coffee on Bill of Lading No. 6.

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976

It is the plaintiff's contention that:

(1) The records of Lehigh Distribution Center, Port Elizabeth, New Jersey, with respect to the aforesaid discharge, disclose the following, with respect to the dischargee of the "GIMBI" coffee:

On September 27, 1971 Marked: A.B. Ghimbi Certif. #2	12 bags received
On September 27, 1971 - Marked: A.B. Ghimbi Certif. #3	1 bag received
On September 28, 1971 - Marked: A.B. Ghimbi Certif. #4	330 bags received
On September 28, 1971 - Marked: A.B. Ghimbi Certif. #5	156 bags received
On September 28, 1971 - Marked: A.B. Ghimbi Certif. #6	108 bags received
On September 28, 1971 - Marked: A.B. Ghimbi Certif. #7	67 bags received
On September 28, 1971 - Marked: A.B. Ghimbi Certif. #8	147 bags received
On September 28, 1971 - Marked: A.B. Ghimbi Certif. #9	107 bags received
TOTAL	928 bags received."

(2) The records of Lehigh Distribution Center disclose that the "GIMBI" HANDPICKED COFFEE was received, as aforesaid.

(3) The plaintiff contends, further, that an additional 1011 bags of coffee were received by Lehigh, which were marked A.F. "DJIMMAS", under Dock

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976

Certificate No. 2/9. These bags of A.F. "DJIMMAS" coffee were not of the importer's original marks, as set forth in Bills of Lading Nos. 5 and 6, although the certificate numbers were the same.

(4) Plaintiff further contends that the records of the defendant, Barber Steamship Lines, Inc. will disclose that there had been a "cross-delivery" of the bags of coffee, and that the bags, with the marks identified as A.F. "DJIMMAS" coffee were, in fact and actually, those of Carl Borchsenious Company, Inc., New York. These bags were returned to Pier 9A by the Lehigh Distribution Center. Thereafter the following bags were located and delivered:

"GIMBI"	A.B. Ghimbi certif. #2 -	12 bags
"	A.B. Ghimbi certif. #4 -	38 bags
"	A.B. Ghimbi certif. #5 -	16 bags
"	A.B. Ghimbi certif. #8 -	18 bags
"	A.B. Ghimbi certif. #9 -	58 bags
	TOTAL:	142 bags of coffee.

(5) Subsequently 390 bags were picked up, leaving a shortage of 781 bags of coffee, as follows:

Certif. #2 -	343 bags short
Certif. #3 -	354 bags short
Certif. #4 -	1 bag short
Certif. #5 -	43 bags short
Certif. #6 -	6 bags short
Certif. #8 -	16 bags short
Certif. #7 -	6 bags over
Certif. #9 -	24 bags short

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It is Defendant and Third-Party Plaintiff, Barber Lines contentions that:

(1) Defendant Barber denies that a shortage greater than 6 bags occurred. If it is held that a shortage did occur, Pittston Stevedoring Corp. caused the shortage and is directly responsible to the plaintiff as bailee. Barber as carrier under COGSA is not responsible to the plaintiff. If it is held that Barber is responsible to the plaintiff, Barber is entitled to full indemnity, including costs, reasonable attorneys fees and interest.

(2) The Release dated November 13, 1972, was not intended to, nor did it apply to the situation now before the Bar.

The contentions of Third-Party Defendant Pittston Stevedoring Corp. are:

(1) All coffee discharged by Pittston Stevedoring Corp. including Bills of Lading Nos. 5 and 6, dated Assab 2 August 1971 from the SS TORONTO at Pier 9A, Port Authority Terminal, Brooklyn, New York, was properly delivered by Pittston.

(2) If there was a cross-delivery of 1011 bags of coffee with the marks A. F. "DJIMMAS" through the fault of Pittston, the final disposition of the coffee must be accounted for by the party so claiming.

(3) If consignee suffered any shortage in the 2,099 bags of coffee said to have been shipped under Bills of Lading Nos. 5 and 6, supra, Defendant, Third-Party Plaintiff is responsible to the Plaintiff therefor under the terms of the said Bills of Lading and the United States Carriage of Goods by Sea Act.

(4) Third-Party Defendant Pittston Stevedoring Corp. did not cause any shortage of the coffee, and, in any event, is not directly responsible to Plaintiff because

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976

Plaintiff did not assert any claim against Pittston [as provided for by Rule 14 (a) of the FRCP], and Defendant, Third-Party Plaintiff in its Third-Party Complaint did not demand judgment against the Third-Party Defendant in favor of the Plaintiff [as provided for by Rule 14 (c) of the FRCP].

(5) The only claim asserted herein against Pittston Stevedoring Corp. is a claim for indemnity asserted by Defendant, Third-Party Plaintiff in its Third-Party Complaint.

(6) If it be found that Pittston caused the loss of some of Plaintiff's coffee, the claim of Defendant, Third-Party Plaintiff against Third-Party Defendant for indemnity fails because of the General Release signed by attorneys for Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager, Klaveness, A.F. & Co., A/S on or about 13 November 1972, releasing and discharging Pittston Stevedoring Corp. with reference to certain enumerated claims, and "any other cargo claims filed against Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhemsen, Fearnley & Eager, Klaveness, A.F. & Co., A/S up to November 13, 1972."

5. The parties agree that the witnesses, whom each party now intends to call, along with the specialty of the experts to be called, are those listed below. Should any party hereafter decide to call any additional witnesses prompt notice of their identity shall be given to each party, in writing, setting forth the reason why such witness was not theretofore identified. No witness may be called, at the trial, unless identified as above stated.

A. PLAINTIFF'S WITNESSES:

1. Surveyor, Roger L. Iverson, of Albert R. Lee & Co., Inc.

2. Receiving Clerk of the Lehigh Distribution Center, Port Elizabeth, New Jersey.

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976

3. Ralph Yaeger of the Davison Transfer & Storage Company, Jersey City, New Jersey.

4. Officer having full knowledge of the shipment of The Sprague & Rhodes Commodity Corporation, 99 Wall Street, New York, New York, 10005.

5. Dock Weigher from W.S. Force & Co., 120 Wall Street, New York, New York 10005.

The plaintiff will not call any expert witness, unless the defendant declines to stipulate as to the sound market value of both "GIMBI" and "DJIMMAS" coffee on the date of delivery.

B WITNESSES DEFENDANT BARBER EXPECTS TO CALL:

1. Chief Officer or other officer of the M/V Toronto.

2. Capt. Harold Schoel or other representatives from Barber Lines, New York.

3. Edmund Schneider.

4. M. E. DeOrchis, Esq.

5. Ara A. Shimshidian, Esq.

6. Sidney J. Wolfson.

C. WITNESSES THIRD PARTY DEFENDANT PITTSTON EXPECTS TO CALL:

1. Margaret D. O'Keefe

2. Romeo Garbelotto

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3. Gerald Hageinseiker

4. John Roza

5. Arnold Johnston

6. Michael Neitz

7. Ralph Sabatino

8. Gerry Del Gatto

9. Vincent De Somma

10. Paul Polemeni

All parties reserve the right to call any of the witnesses designated by any other party.

6. The parties agree that the following documents, which were marked for identification, or which are otherwise identified in the order, are authentic and may be received in evidence, (each party reserving the right to object to all, or a portion of each document, upon the ground, among others, that it is not admissible, under the hearsay rule):

SEE LIST OF EXHIBITS PREPARED BY SYMMERS, FISH AND WARNER, ANNEXED HERETO AS APPENDIX A.

7. Plaintiff claims the right to recover damages, for the loss of 781 bags of coffee, in the total sum of $44,473.25, as follows:

Insured value 56,800.00 x 83 bags -		$ 4,723.85
Insured value 62,500.00 x 698 bags -		39,623.07
	Total 781 bags	$44,346.92
	Slackage	126.33
	TOTAL DAMAGES	$44,473.25

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976

The parties also agree upon the following matters:

(a) Plaintiff at this time, expects to require 1 1/2 days for trial.

(b) Defendant Barber, at this time, expects to require 1 1/2 days for trial.

(c) Third-Party Defendant Pittston, at this time, expects to require 1 1/2 days for trial.

8. The issues to be tried by the Court, as formulated by the Court (with the consent and agreement of the parties), are as follows:

(1) Was there any non-delivery to the Plaintiff by Barber Steamship Lines, Inc. of the coffee described in Assab to New York Bills of Lading Nos. 5 and 6 dated on or about 2 August 1971?

(2) What are the plaintiff's damages, if any?

(3) Did the Third-Party Defendant discharge from the TORONTO at Pier 9A, Port Authority Terminal, Brooklyn, New York in September 1971 the bags of coffee described in Assab to New York Bills of Lading dated on or about 2 August 1971?

(4) Was there any negligence or breach of any warranty by Third-Party Defendant to Barber Steamship Lines, Inc.?

(5) What are Defendant and Third-Party Plaintiff's damages, if any?

(6) It Third-Party Defendant directly liable to Plaintiff for any non-delivery?

(7) Was there any negligence or breach of contract by Third-Party Defendant to Plaintiff?

PRE-TRIAL ORDER FILED 10 MAY, 1976, SIGNED BY RYAN, J., 12 MAY, 1976

(8) Is Defendant and Third-Party Plaintiff entitled to reasonable attorney's fees and costs from Third-Party Defendant?

(9) Did Defendant and Third-Party Plaintiff release Third-Party Defendant from any liability arising out of the handling of the coffee discharged from the TORONTO at Pier 9A, Port Authority Terminal, Brooklyn, New York during September 1971?

Dated: New York, New York [illegible] 1976

SO ORDERED:

[illegible]

U.S.D.J.

CONSENTED TO:

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff

BY: DANIEL A. SULLIVAN

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants and Third-Party Plaintiffs

BY: Chester D. Hooper

SYMMERS, FISH & WARNER
Attorneys for Third-Party Defendant

BY: William Warner

APPENDIX A, ANNEXED TO PRE-TRIAL ORDER--LIST OF EXHIBITS.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

SS TORONTO, her engines, boilers, etc.,

-and against-

WILH WILHELMSEN, and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S,

Defendants and
Third-Party Plaintiffs,

-against-

PITTSTON STEVEDORING CORP.,

Third-Party
Defendant.

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LIST OF EXHIBITS
FOR IDENTIFICATION

Identification Number	Description	Marked as:
1.	Release dated 13 November 1972 (7 pages)	Pittston Exh. 1 for id., DeOrchis dep. at p. 4
2.	Letter from Barber Steamship Lines to Haight, Gardner, dated 3 October 1972, with attachments (8 pages)	Pittston Exh. 2 for id., DeOrchis dep. at p. 8
3.	Letter from Barber Steamship Lines to Pittston, dated 14 September 1972, with attachments (8 pages)	Pittston Exh. 3 for id., DeOrchis dep. at p. 10
4.	Letter from Pittston to Capt. Sohoel, dated 19 September 1972 (1 page)	Pittston Exh. 4 for id., DeOrchis dep. at p. 13
5.	Letter from Pittston to Stanley Brandt, dated 21 Sept. 1972 (1 page)	Pittston Exh. 5 for id., DeOrchis dep. at p. 15

APPENDIX A, ANNEXED TO PRE-TRIAL ORDER

6.	Letter from Haight, Gardner to Pittston, dated 5 October 1972 (2 pages)	Pittston Exh. 6 for id., DeOrchis dep. at p. 15
7.	Letter from Haight, Gardner to Pittston, dated 8 Nov. 1972, with attachments (4 pages)	Pittston Exh. 7 for id., DeOrchis dep. at p. 25
8.	Letter from Haight, Gardner to Pittston, dated 13 Nov. 1972 (1 page)	Pittston Exh. 8 for id., DeOrchis dep. at p. 26
9.	Letter from Pittston to Haight, Gardner, dated 13 Nov. 1972 (1 page)	Pittston Exh. 9 for id., DeOrchis dep. at p. 26
10.	Letter from Haight, Gardner to Barber Steamship Lines, dated 13 Nov. 1972 (2 pages)	Pittston Exh. 10 for id., DeOrchis dep. at p. 30
11.	Letter from Sprague & Rhodes to Barber Steamship Lines, dated 15 October 1971 (1 page)	Pittston Exh. 11 for id., DeOrchis dep. at p. 35
12.	Letter from Sprague & Rhodes to Davidson Transfer & Storage Co., dated 15 October 1971 (1 page)	Pittston Exh. 12 for id., DeOrchis dep. at p. 36
13.	Claim from Chubb & Son, Inc., dated 26 January 1972 (1 page)	Pittston Exh. 13 for id., DeOrchis dep. at p. 40
14.	Letter from Barber Steamship Lines to Chubb & Son, dated 28 March 1972 (1 page)	Pittston Exh. 14 for id., DeOrchis dep. at p. 40
15.	Letter from Johnson & Higgins to Chubb & Son, Inc., dated 23 December 1971 (1 page)	Pittston Exh. 15 for id., DeOrchis dep. at p. 41
16.	Letter from Albert R. Lee & Co. to Sprague & Rhodes, dated 17 January 1972 (4 pages)	Pittston Exh. 16 for id., DeOrchis dep. at p. 41
17.	Report of Albert R. Lee & Co., dated 29 March 1972 (5 pages)	Pittston Exh. 17 for id., DeOrchis dep. at p. 42

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APPENDIX A, ANNEXED TO PRE-TRIAL ORDER

18.	Letter from Bigham, Englar to Haight, Gardner, dated 22 Feb. 1973 (2 pages)	Pittston Exh. 18 for id., DeOrchis dep. at p. 43
19.	Pages 89 & 90 from Pittston delivery records, Assab/N.Y. opt. Baltimore, B's/L 5 & 6 (2 pages)	Pittston Exh. 19 for id., DeOrchis dep. at p. 43
20.	Barber Lines bills of lading 5 & 6, Assab/N.Y. opt. Baltimore (2 pages)	Pittston Exh. 20 for id., DeOrchis dep. at p. 48
21.	Pittston Over, Short and Damage Report, dated 5 January 1972 (7 pages)	Pittston Exh. 21 for id., DeOrchis dep. at p. 50
22.	Barber Lines manifest of the TORONTO (1 page)	Pittston Exh. 22 for id., DeOrchis dep. at p. 50
23.	Letter from Barber Steamship Lines to Pittston, dated 14 Sept. 1972 (8 pages) [same as Pittston Exh. 3 for id., DeOrchis dep.]	Pittston Exh. 23 for id., O'Keefe dep. at p. 18
24.	Letter from Sprague & Rhodes to Barber Steamship Lines, dated 15 October 1971 (1 page)	Pittston Exh. 1 for id., Schneider dep. at p. 12
25.	Page 89 of Pittston Stevedoring delivery records (1 page) [same as Pittston Exh. 19, DeOrchis dep.]	Pittston Exh. 2 for id., Schneider dep. at p. 23
26.	Page 90 of Pittston Stevedoring delivery records (1 page) [same as Pittston Exh. 19, DeOrchis dep.]	Pittston Exh. 3 for id., Schneider dep. at p. 23
27.	Sheaf of documents, first page headed "Claims against Pittston Stevedoring Corp." (13 pages)	Pittston Exh. 4 for id., Schneider dep. at p. 26
28.	Office memorandum from W.J. Shields to E.J. Schneider, dated 1 August 1972 (1 page)	Pittston Exh. 5 for id., Schneider dep. at p. 28

APPENDIX A, ANNEXED TO PRE-TRIAL ORDER

29.	Telex No. 7 from Barber, Oslo, 1:30 PM, Nov. 10, 1972 (1 page)	Pittston Exh. 6 for id., Schneider dep. at p. 33
30.	Telex No. 1 for Barber, New York, 11/10/72, 1400 hours (1 page)	Pittston Exh. 7 for id., Schneider dep. at p. 33
31.	Telex No. 2 for Barber, New York, 11/13/72, 1615 hours (1 page)	Pittston Exh. 8 for id., Schneider dep. at p. 34
32.	Letter from Capt. Sohoel to Shipowners Claims Bureau, dated 19 Sept. 1972 (1 page)	Wolfson Exh. 1 for id., dep. at p. 15 [marked Exh. 2]
33.	Letter from Pittston Stevedoring to Capt. Sohoel, dated 19 Sept. 1972 (1 page)	Wolfson Exh. 2 for id., dep at p. 15 [marked Exh. 1]
34.	Letter from Haight, Gardner to Shipowners Claims Bureau, dated 3 Nov. 1972 (2 pages)	Wolfson Exh. 3 for id., dep. at p. 17
35.	Letter from Shipowners Claims Bureau to Haight, Gardner, dated 6 Nov. 1972 (2 pages)	Wolfson Exh. 4 for id., dep. at p. 18
36.	Letter from Shipowners Claims Bureau to Haight, Gardner, dated 10 Nov. 1972 (2 pages)	Wolfson Exh. 5 for id., dep. at p. 19
37.	Letter from Haight, Gardner to Shipowners Claims Bureau, dated 10 Nov. 1972 (5 pages)	Wolfson Exh. 6 for id., dep. at p. 19
38.	Letter from Shipowners Claims Bureau to Assuranceforeningen Skuld, dated 10 Nov. 1972 (1 page)	Wolfson Exh. 7 for id., dep. at p. 20

APPENDIX A, ANNEXED TO PRE-TRIAL ORDER

39.	Group of letters and documents, as follows: Letter from Barber Steamship Lines to Pittston Stevedoring, dated 14 Sept. 1972 (1 page), attached to memo dated 21 August 1972 (1 page), and schedule of claims (7 pages) Letter from Barber Steamship Lines to Shipowners Claims Bureau, dated 19 Sept. 1972 (1 page) Letter from Pittston Stevedoring to Capt. Sohoel, dated 19 Sept. 1972 (1 page) Letter from Barber Steamship Lines to Haight, Gardner, dated 3 October 1972 (1 page) Office memorandum from E.J. Schneider to Capt. Sohoel, dated 18 October 1972, attached to letter from Haight, Gardner to Barber Steamship Lines dated 13 October 1972 (3 pages) Letter from Barber Lines to Haight, Gardner, dated 13 Nov. 1972 (1 page) Office memorandum from E.J. Schneider to A.E. Dalbert dated 14 Nov. 1972, attached to letter from Haight, Gardner to Barber Steamship Lines dated 13 Nov. 1972 and letter from Pittston Stevedoring to Haight, Gardner dated 13 Nov. 1972 enclosing general release (11 pages)	Sohoel Exh. 1 for id., dep. at p. 15
40.	First page of letter from Barber Lines A/S to Barber Lines A/S Oslo, Norway, dated 8 Nov. 1972 (1 page)	Sohoel Exh. 2 for id., dep. at p. 18
41.	Hatch list, M/S TORONTO (2 pages)	Barber Cottrell Exh. A for id., dep. at p. 6
42.	Cargo plan, M/S TORONTO, Voy. No. 3046 (1 page)	Barber Cottrell Exh. B for id., dep. at p. 6

APPENDIX A, ANNEXED TO PRE-TRIAL ORDER

43.	Sorting sheets, Voy. 3046 (10 pages)	Barber Cottrell Exh. C for id., dep. at p. 7
44.	Cargo recap by hatch, M.S. TORONTO Voy. 3046 (1 page)	Barber Cottrell Exh. D for id., dep. at p. 7
45.	Pittston Stevedoring Corp. daily discharging, delivery and cargo summary report (14 pages)	Barber Cottrell Exh. E for id., dep. at p. 8
46.	Pittston Stevedoring Corp., Over Short and Damage Report, dated 5 January 1972 (8 pages)	Barber Cottrell Exh. F for id., dep. at p. 8
47.	Handwritten list of cargo short and on dock (4 pages)	Barber Cottrell Exh. G for id., dep. at p. 9
48.	Pittston Stevedoring Corp. Dock Demurrage Reports (8 pages)	Barber Cottrell Exh. H for id., dep. at p. 9
49.	Pittston Stevedoring Corp. Dock Demurrage Invoices (13 pages)	Barber Cottrell Exh. I for id., dep. at p. 10
50.	Log Book Records for Sept. 4-18 and 22, 1971	Barber Cottrell Exh. J for id., dep. at p. 11
51.	Computer printout, W4 name and address file as of 10/07/74 (9 pages)	Barber Cottrell Exh. K for id., dep. at p. 11
52.	Pittston Stevedoring Corp. Invoices, attached to Commercial Labor Slips and Invoice Billing, IBM Code Sheets (55 pages)	Barber Cottrell Exh. L for id., dep. at p. 14
53.	Stevedoring Contract dated 21 March 1970 (10 pages)	Barber Cottrell Exh. M for id., dep. at p. 15
54.	Pittston Stevedoring Corp. Delivery Receipts, pages 1-113	Barber Cottrell Exh. N for id., dep. at p. 18
55.	Pittston Stevedoring Corp. Delivery Receipts and handwritten list (31 pages)	Barber Cottrell Exh. N-1 for id., dep. at p. 18

APPENDIX A, ANNEXED TO PRE-TRIAL ORDER

56.	"Toronto" Voy. 3046, Freight Manifest, Office Copy	Barber Cottrell Exh. O for id., dep. at p. 55
57.	Barberlines Bill of Lading No. 5, Assab/N.Y. opt. Baltimore (1 page)	Barber Cottrell Exh. P for id., dep. at p. 56
58.	Barberlines Bill of Lading No. 6, Assab/N.Y. opt. Baltimore (1 page)	Barber Cottrell Exh. P-1 for id., dep. at p. 56

59 Transcript of deposition of Mr. M. E. De Orchis

60 Transcript of deposition of Miss Margaret O'Keefe

61 Transcript of deposition of Mr. Alan J. Cottrell

62 Transcript of deposition of Mr. Edmund J. Schneider

63 Transcript of deposition of Mr. Sydney Wolfson

64 Transcript of deposition of Captain Harold S. Sohoel

GWjw TRANSCRIPT OF RECORD OF PROCEEDINGS OF JULY 1, 1976 (TRIAL). 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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THE SPRAGUE & RHODES COMMODITY CORP., :

Plaintiff,

-against- :

S.S. "TORONTO", her engines, boilers, etc., :

-and against- 72 Civ. 3294

WILH WILHELMSEN, and BARBER STEAMSHIP LINES, INC., and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S, :

Defendants and Third-Party Plaintiffs, :

-against- :

PITTSTON STEVEDORING CORP., :

Third-Party Defendant. :

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July 1, 1976
10:45 A.M.

B E F O R E :

HON. WILLIAM C. CONNER,

District Judge.

A P P E A R A N C E S :

BIGHAM, ENGLAR, JONES & HOUSTON, ESQS.,
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Defendant
WILLIAM WARNER, ESQ., of Counsel

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T1 (Case called)

MR. HART: Ready.

MR. WARNER: Ready.

MR. HOOPER: Ready.

THE COURT: All right.

Gentlemen, I have read your pre-trial papers and we can dispense with the opening statements unless there is something in addition that you are burning to tell me.

MR. HART: No, your Honor.

As I understand it, the bills of lading are all the proof that is necessary as to show that the cargo was

1 placed aboard the ship and coffee was discharged at Pier
2 9-A, Port Authority Terminal, Brooklyn, New York, I think
3 it is agreed to by all the parties.
4 THE COURT: All right.
5 MR. HART: It is conceded in the stipulated
6 facts, your Honor, in the pre-trial order.
7 THE COURT: Let me ask you this, and this is
8 really directed to counsel for the defendant and the
9 third-party defendant.
10 Is there any dispute really other than the ques-
11 tion of which of the two of your clients is responsible
12 for the loss? Apparently the plaintiff was entitled to
13 delivery of coffee and did not get it.
14 It seems to me reasonably clear that the plain-
15 tiff is entitled to recover reasonable value of that coffee.
16 The only question is whether the shipowner or the stevedore
17 is responsible.
18 MR. HOOPER: Your Honor, we don't have any
19 evidence to show that the plaintiff's claim is not correct.
20 The only evidence that we have is the stevedore's delivery
21 book which indicates that the delivery to the plaintiff
22 was complete.
23 THE COURT: But the delivery included a large
24 number of bags that were of the wrong kind of coffee and
25

were not intended for delivery to the plaintiff, and the plaintiff asserts, I believe, without any dispute that it had that coffee redelivered to the correct consignee or to the correct owner.

MR. HOOPER: That is what the plaintiff contends.

MR. WARNER: I see no evidence. I have had interrogatories outstanding for four years and never got an answer. I don't know how it happened.

THE COURT: All right.

Mr. Hart, I think all you need to prove is the fact that some of that coffee that was delivered to you was not intended for you and that you redelivered it to the right party.

MR. HART: That is correct, your Honor. The only thing that I would say on that is that I would put my surveyor on the stand, the gentleman from Borchinius Company. I only have a letter here from him. This would be hearsay. My surveyor was told by the Borchinius man that he went himself to the warehouse and picked up the coffee.

THE COURT: I do not know whether the other parties are going to object to hearsay. If they do, I have to sustain an objection.

MR. HART: That is what I wanted to say, your Honor.

Subject to that, I can go ahead with my surveyor. I couldn't get that man today in court. I would have to get him on Tuesday.

THE COURT: I want to narrow this thing down to the issues that are really in dispute so we do not waste time proving things in which there is no dispute. I do not think that there is any dispute that the coffee was put on board on Ethiopia. I do not think there is any question that the amount that the plaintiff got is less than -- it received a quantity of coffee. The only question is whether or not some of that coffee was not intended for it and it, therefore, redelivered it to the right party.

Now, if you do not have evidence of that fact, I do not know why you need put in any case at all. I will give you some more time if you want to get a witness, and you can get a witness.

MR. HART: I can get a witness, your Honor.

THE COURT: Unless counsel will receive the hearsay testimony without objection.

MR. WARNER: Your Honor, I would like very much to say that I could, but I can't.

THE COURT: I am not going to insist that you

do that. You are entitled to object to it.

I would have to sustain the objection.

MR. HART: To answer your Honor's question directly, I subpoenaed the records from the warehouse. I received a letter from the warehouse man that he didn't have any records, that the company was taken over and that letter that I received was what this warehouse man will testify to.

Therefore, I have to get my surveyor to tell what he saw over there.

THE COURT: If he is going to tell what he saw, that is not hearsay.

MR. HART: I know. Your Honor asked a pertinent question. Then this other man that I have, Borchinius, he is going to testify that he went to the warehouse and he picked up his coffee and brought it back. My only answer --

THE COURT: Why couldn't you get him?

MR. HART: I couldn't get him today. That's all. He's got another trial or something. I could get him on Tuesday.

THE COURT: If you want to take witnesses out of order, I will permit you to do that. Can you get him tomorrow, tomorrow afternoon?

MR. HART: No, Tuesday.

THE COURT: Tuesday?

MR. HART: Yes.

THE COURT: I will have another case on trial on Tuesday, I believe. We will set another date for it. We will go ahead and take the other testimony.

Do you have any other evidence in your prima facie case?

MR. HART: No.

THE COURT: All right.

You rest subject to calling that man from Borchinius to testify that he picked up the coffee from the plaintiff's warehouse?

MR. HART: Yes.

THE COURT: All right.

MR. HART: Mr. Iverson.

THE COURT: I thought you said you did not have any other evidence in your prima facie case.

MR. HART: He went out to the warehouse and saw the coffee.

THE COURT: He is going to say it was there?

MR. HART: Yes.

THE COURT: All right, come on up. I do not know why it is necessary. I do not think there is any

dispute that it was there; the defendant or the third-party defendant delivered it to the warehouse of the company over in New Jersey that was stevedoring it on behalf of the defendant, do you?

MR. WARNER: Your Honor, there a gentleman signed our delivery book. They took some bags. I have never taken this gentleman's deposition. I would like very much to hear what his testimony is.

THE COURT: All right. I just thought we could shortcut it by stipulating that all of the coffee referred to here, so many bags of the Gimbi Coffee and so many bags of the Djimmas Coffee were delivered to the Lehigh Distribution Center, Port Elizabeth, New Jersey for storage on behalf of the defendant.

MR. WARNER: Very close to 60,000 bags were handled in New York. There was more coffee going to the same place, discharged in Baltimore. There are inconsistencies galore. Even our records show over 400 bags were not in the ship at New York. They were turned over to the shipowner.

THE COURT: All right. Swear the witness.

1 ROGER IVERSON, called as a
2 witness by the plaintiff, being first duly sworn,
3 testified as follows:
4 DIRECT EXAMINATION
5 BY MR. HART:
6 Q Mr. Iverson, by whom are you employed?
7 A Albert R. Lee & Company, Incorporated.
8 Q What business is Albert R. Lee & Company,
9 Incorporated?
10 A Marine surveyor.
11 Q How long have you been a marine surveyor?
12 A Twelve years.
13 Q During the course of your twelve years did you
14 have occasion to survey coffee?
15 A Yes, many times.
16 Q Do you recall receiving a claim on or about
17 October the 14th, 1971 from Sprague & Rhodes, the plaintiff
18 in this action?
19 A I received it from the insurance company which
20 was Chubb & Son.
21 Q They are the underwriter for Sprague & Rhodes &
22 Company?
23 A Right.
24 Q In response to that claim, did you inspect the
25

coffee at any place?

A Yes.

Q Where did you inspect this coffee?

A At Pier 9-A, Brooklyn.

Q What date was that, the first date you went to the pier?

A That was December 1, 1971.

Q From the period of October the 1st under November 29, 1971 was there a longshoremens strike in the harbor of New York?

A Yes.

Q That encompassed in its scope Pier 9-A, Port Authority Terminal, Brooklyn, New York?

A Yes, it did.

Q The strike was over on November the 29th, 1971?

A Right.

Q And you appeared at Pier 9-A, Port Authority Terminal, Brooklyn,New York on December the 1st, 1971?

A Yes.

Q When you went to the pier, whom did you see at the pier?

A I spoke to several people, the delivery clerk, and I checked his delivery records.

Q Did you speak to --

A I spoke to the pier superintendent.

Q Do you recall the name of the pier superintendent?

A Mr. Johnson.

Q Was that Mr. Donald Johnson?

A Yes.

Q What did you say to him and what did he say to you and what records did you examine with respect to the coffee, the Gimbi Coffee?

A I checked the delivery records and found that there was, in fact, a shortage of 60 bags on delivery No. 6, although the importer was claiming for a much larger shortage due to the heavy conjestion on the pier. At this time it was impossible to make a complete detailed inspection.

Q What was the next date on which you made an inspection of this Gimbi Coffee?

A Then I was over to Lehigh terminal warehouse.

Q What date?

A That was on December 9th.

Q Whom did you speak to at the Lehigh Distribution Center?

A The receiving clerk.

Q Did the receiving clerk present you with any documents?

A Yes, he did.

Q What documents did the receiving clerk at the Lehigh Distribution Center present you with?

A The receiving tallies covering bags of coffee from the SS Toronto.

Q In other words, the receiving clerk at the Lehigh Distribution Center presented you with the receipts for the coffee that was delivered on the bill of lading No. 5 and bill of lading No. 6?

A Yes.

Q That was Gimbi Coffee?

A That's right.

Q Did you from those delivery receipts make records yourself of what was received and what was not received?

A Yes, sir, I did.

Q Would you please tabulate what those records disclosed?

A It shows that on various dates they received A.B. Gimbi Certificate Numbers 2, 3, 4, 5, 6, 7, 8 and 9 for a total of 928 bags.

Q That was under bill of lading what?

A That was under bill of lading No. -- bill of lading No. 5.

Q How about bill of lading No. 6?

A They received a total of 1,011 bags. These were

marked A.B. Djimmas.

Q While you were at the warehouse, the Lehigh Distribution Center on December the 9th, 1971, did you have occasion to examine the bags of coffee?

A Yes, I physically examined the bags of coffee and there were, in fact, adverse marks.

Q Were the bags of coffee under Djimmas the same certificate numbers as the bags of coffee under the Gimbi?

A Yes.

Q In other words, am I right in saying it was 2, 3, 4, 5, 6, 7, 8 and 9?

A The certificate numbers were the same but the head marks were different.

Q You examined that coffee?

A Right.

Q What coffee was it?

A It was Djimmas.

Q Did you have occasion after December the 9th to go back to the pier?

A Yes, I did.

Q On what date did you go back to the pier?

A Well, after my -- after my realizing there had been a cross delivery, I communicated to the steamship company

discussed this with them, requested that they have their own surveyors discuss this with me.

They declined to participate in the survey. They did acknowledge they knew there had been cross deliveries.

Q The next time you went back to the pier, was that December the 13th?

A Yes.

T2 1 JKjw 1 Iverson - direct 15

2 Q All right.

3 Now, whom did you speak to at the pier then?

4 A I spoke with, again, the delivery clerk, the

5 Pier 2 superintendent, and the location man.

6 Q The pier superintendent was Mr. Arnold Johnson?

7 A Mr. Johnson, right.

8 Q What did you say to him and what did he say to

9 you with respect to the Gimbi coffee?

10 A He acknowledged the fact that there was a cross

11 delivery and also advised that there were Gimbi marks on the

12 pier.

13 Although they did show almost complete

14 delivery, there were bags of my marks still on the pier

15 available for delivery.

16 Q What arrangements, if any, did he make with

17 you with respect to the Gimbi coffee?

18 A Arrangements were made to have a forklift or

19 Hi-Lo driver and some labor on the pier to sort out

20 bags of coffee that were intermixed, both Gimbi and Djimmas.

21 Q Refreshing your recollection, if you have to,

22 from your report that you made, how many bags of Gimbi

23 coffee did you find when you went back to the pier on

24 December the 13th, 1971?

25 A Let's see, we found approximately 268 bags.

Q Now, what was the next time you appeared at Pier 9-A, the next date?

A December 22nd.

Q Whom did you speak to on that occasion?

A Again with Mr. Johnson.

Q What arrangements if any did you make at that time about the Gimbi coffee?

A Well, with the location man, and with some help, we went down and we found an additional 142 bags marked with my original certificate numbers.

Q Did he supply you with any Hi-Lo or anything to separate this coffee?

A Yes, he did.

Q Did you separate this coffee?

A Yes, we did.

Q How many bags of Gimbi coffee did you find on December the 22nd?

A 142 bags.

Q Of Gimbi coffee?

A Of Gimbi coffee.

Q When was the next time that you returned to the pier in connection with this loss?

A What we did, because the actual delivery records showed only a shortage of 60 bags, and it was acknowledged

that there were other bags that our people picked up with adverse marks, I recommended that an open delivery order be sent to the pier for the 410 bags.

Q What is an open delivery order?

A It's just a blank delivery order bearing these marks and numbers for deliveries.

Q Did you return to the pier on February 2nd?

A February 2nd I was at the pier again.

Q What did you find on that occasion? Withdrawn.

Did you speak to this pier superintendent on that occasion?

A Yes.

Q Did you speak to the delivery clerk?

A Yes, we did.

Q What did you find on that occasion with respect to the Gimbi coffee, how many bags?

A A total of 390 bags were delivered.

Q You say they were delivered; they were delivered to the Lehigh Distribution Center. Do the records disclose that?

A Yes, the records would disclose that, sent to the Lehigh Distribution Center.

Q So on December the 9th, at the Lehigh, you found Gimbi and Djimmas coffee?

A Yes.

Q And then on December the 13th you found 261 bags?

A Right.

Q And then on --

THE COURT: I thought he said 268.

MR. HART: 268. Beg your pardon.

Q Then on December 23rd, you found another 42 bags of Gimbi coffee?

A Right.

Q And then on February the 2nd, 1972 you found 390 bags of the Gimbi coffee?

THE COURT: No.

A No.

THE COURT: He found 390 bags and 410 bags he found had been delivered to Lehigh.

Q They had been delivered to Lehigh?

A Yes.

Q So out of the total shipment how many bags were short?

A 781.

Q Do you have any personal knowledge of what happened to the Djimmas coffee?

A Yes, in talking with the steamship company they were advised, the original marks of Djimmas were consig

Carl Borchinius, and those coffees, whatever he was short, part of it was picked up from Lehigh Terminal.

Q And delivered to Carl Borchinius?

A Delivered to Carl Borchinius' customer, yes, because Carl Borchinius, they didn't store any bags at Lehigh.

Q And the net total of non-deoivered Gimbi bags was 781?

A Yes, 781.

THE COURT: Wait a minute. They had to deliver 1011 bags of Djimmas coffee from Lehigh over to Borchinius, right? Then they got 390 back. Deducting 390 from 1011 doesn't come out to 781, but instead 621, it seems to me.

THE WITNESS: Well, they were originally short -- let's see.

THE COURT: Lehigh got 928 bags of Gimbi coffee.

THE WITNESS: Right.

THE COURT: 1011 bags of Djimmas coffee.

THE WITNESS: Right.

THE COURT: And the latter had been cross-delivered so they turned it all over to the owner, which means that they were now 1011 bags short. Then they got

390 bags that you had found over at Pier 9-A.

Deducting 390 from 1011 gives me 621.

THE WITNESS: In addition to that there was also a shortage on bill of lading No. 5. The shipment called for 998 bags, but they only received 928.

THE COURT: Oh, but that had been made up already because they delivered 30 bags later on, they were supposed to -- or 60 bags later on.

THE WITNESS: 60 bags were never delivered.

THE COURT: They were never delivered.

THE WITNESS: They were short originally. That's what the records show when I was down at the pier the first time.

THE COURT: They were never delivered. That adds up to 681, not 781.

MR. HART: Your Honor, we were supposed to receive 2,099 bags of Gimbi coffee. According to my records, and I think the surveyor will sustain me on this one, we received 1318 bags of Gimbi coffee. That's all the Gimbi coffee we received.

THE COURT: You are right. You got 1318.

MR. HART: So that leaves me 781 bags of Gimbi coffee short.

THE COURT: All right.

THE COURT: All right.

MR. HART: That is all I have with this witness, your Honor.

THE COURT: All right. Any cross examination?

CROSS EXAMINATION

XXX BY MR. HOOPER:

Q Mr. Iverson, could you describe the conditions on the pier as you saw them the first time you visited the pier after the strike had ended?

A Extremely congested.

Q Were you able to locate any of the bags of coffee for which you were searching on that original visit to the pier?

A No, I did not.

Q Did the pier superintendent or anyone tell you whether or not he knew that the bags you were searching for were someone on the pier at that time?

A I believe he had hoped that there were a quantity of these bags on the pier.

Q But he didn't know how many?

A He wasn't exactly sure, no.

Q Are you familiar with the custom of the stevedoring industry in the Port of New York to record cross-deliveries, the method they might use to record a cross-

delivery?

A Am I familiar with how they would -- if they knew it?

Q Yes. How they would record it, what book they would use to show there was a cross-delivery, to try to correct things.

A In a case like this, I don't think they knew about it until after I was there.

Q That is right, but at that time do you know whether or not the custom of the industry would call for any entry to be made in the stevedore delivery book to show that there had been a cross-delivery?

A They had not shown me any, no.

Q The question is, do you know whether they should have made any entry?

A Yes, they should have. I would think so. Yes, definitely.

Q Do you know the kind of entries they should have made?

A They should have recorded in the delivery book that there was a short cross-delivery, either from whoever calls them, the truckman, the warehouse, whatever the case may be.

Q In other words, when the stevedore realized that

there had been a cross-delivery from a bill of lading sense he should have made a notation on a delivery book page which corresponded to bill of lading 6 to note that there had been a cross-delivery?

A Right, after it had been checked out, yes.

Q And that would help straighten things out?

A Yes.

Q Are you also familiar with the custom of the industry in discharging vessels, the stevedore's responsibility to discharge a vessel?

A No, I'm not, because I don't work for stevedore companies.

MR. HOOPER: I have no further questions.

CROSS EXAMINATION

XXX BY MR. WARNER:

Q Mr. Iverson, you testified on your direct examination that you conferred with someone from the shipowners. Who was that?

A The steamship company?

Q Yes, whom did you speak to?

A I think it was a Mr. Otis, Herbert Otis.

Q What is his position in the steamship company?

A I believe he was in the traffic department, in-bound traffic.

Q Let me see if I can recap this.

You went over to the Lehigh, you looked at the bags there, some were Gimbi's, some were Djimmas; the people at Lehigh said, "There is a mixup here."

Did you go over and see this gentleman personally Did you speak to him on the phone? How did you convey to him --

A I spoke with the individual from the carrier on the phone.

Q And you apprised him of the problem?

A Yes, I did.

Q What did he say to you?

A Yes, he had knowledge of the problem.

Q Prior to your calling him?

A Yes.

Q How had he acquired that knowledge, did he tell you?

A I believe Sprague & Rhodes, the importers, sent a claim in.

Q The first time you went to Lehigh was December 9th, is that correct?

A Yes.

Q When did you speak to this Mr. Otis, the ship-owner?

A I spoke with him after my return from the Lehigh Terminal.

Q On the same day or --

A The same day or several days later, I don't really recall.

Q Now, the 22nd, you discussed the matter again with the steamship company, the same Mr. Otis?

A Let's see, on the 22nd of December I was on the pier, back at the pier again.

Q In the middle of the paragraph on Page 4 you state in your report, "We discussed this matter with the steamship company."

A Yes.

Q Again, Mr. Otis or somebody else?

A No, either Mr. Patterson or Mr. Otis. I talked with both of them, I believe, on one or two occasions for each.

Q What did Mr. Patterson do?

A Mr. Patterson was in the claims department. I believe it was Mr. Patterson.

Q In your direct testimony you mentioned an open delivery order.

A Yes.

Q Who issues an open delivery order?

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A Well, the arrangements were made in order for us to get these bags, to issue the order, to have our coffee go to Lehigh Terminal, the Lehigh warehouse, and then we'll take delivery of that coffee from there against which -- actually the Djimmas coffee.

You see, Carl Borchinius had several bills of lading on this vessel.

Q First I've got a definition problem with the expression "open delivery order," which you mention in your report, and you mentioned here in your testimony this morning.

What is an open delivery report and who issues it?

A Sprague & Rhodes issued a delivery order in their name to the pier for delivery of coffees to their warehouse.

Q Did this step --

A Which was Lehigh.

Q Did this step have the approval of the shipowner?

A Yes, it must have because it was picked up.

Q It says here in your report, "We discussed this with the steamship company and the stevedore and it was agreed an open delivery order would be lodged at the pier in order to pick up the 410 bags of coffee."

So you did discuss it with the shipowner at that time?

A Yes.

THE COURT: The reason it was made an open order is that you didn't know how many bags you were going to find.

THE WITNESS: I didn't have no idea.

THE COURT: If you found more than 410 or if they found more than 410 you were going to take it.

THE WITNESS: I'll take it. Certainly. The more I get the better off I am.

Q Now, the first time that you went to the pier, you have testified on your direct that the pier was congested.

Was it physically possible to count the bags of coffee that were there?

A No.

Q It could not be done?

A Not my marks and numbers, no.

Q When was it first possible foryou to determine what the marks and numbers were?

A At the time of my first inspection, there were several vessels in the pier to be discharged, and they were discharging various types of cargoes at that time,

so I decided to come back several weeks later, and I believe that was on December 13th.

Q And at that time --

A And at that time we spoke with Mr. Johnson, the pier superintendent, and were advised that 268 bags were available and located on the pier.

Q Did you have anything to do with the delivery of the Djimmas coffee to Borchinius?

A Nothing.

THE COURT: I thought you called it to the attention of the shipowner.

THE WITNESS: Oh, yes, but I didn't make any arrangements with the delivery between the shipowner and Carl Borchinius.

THE COURT: Did you ever see any records that it had been delivered?

THE WITNESS: No, I didn't. No. I've just seen some letters which transpired between the carrier and Carl Borchinius.

Q Did you examine the delivery book which was kept by Pittston while you were at Pier 9-A in December, 1971?

A On December 1st I examined the records.

Q You did?

A Yes.

Q You looked at bills of lading 5 and 6 which were Sprague & Rhodes Assab/New York option Baltimore?

A Yes.

Q Did you look at bill of lading 7, Assab/New York Option Baltimore?

A No, I did not. I was only requested to investigate the non-deliveries on 5 and 6.

Q Do your records show that on December 23rd and January 6th, 12 and 42 bags of Gimbi were delivered t- Sprague & Rhodes?

A On what dates?

Q December 23rd, 12 bags, and January 6th, 42 bags.

A No.

Q So there is a difference then, you say, another 54 bags had been accounted for, if my statement is correct.

A That is correct, yes.

Q You had no knowledge of that?

A I had no knowledge of that, no. All I had knowledge of was the 390. Whether that included the 54, I don't know.

MR. WARNER: Thank you.

THE COURT: Any redirect?

REDIRECT EXAMINATION

XXX BY MR. HART:

Q You were asked a question on cross examination about the return of the Gimbi coffee.

Now, do you know -- pardon me, I withdraw that, Gimbi -- the Djimmas coffee.

Do you know how many bags of coffee came over on the Toronto, Djimmas coffee?

A How many bags?

Q Bags.

A No.

THE COURT: You did not see the manifest?

THE WITNESS: No.

Q And the computations that we have made here on the 781 bags are solely and singularly with respect to the Gimbi coffee?

A Yes.

MR. HART: That is my --

THE COURT: What are you trying to say?

MR. HART: That is my case, subject to your Honor said --

THE COURT: All right. I think we have a little further recross.

RECROSS EXAMINATION

XXX BY MR. HOOPER:

Q Mr. Iverson, are you familiar with the over, short and damage report?

A I was indeed, yes.

Q Will you tell us what it is?

A It is over, short and damage cargo.

Q Who prepares it?

A Usually for shortage, the location man, or there are several people that do tally this up.

Q In other words, they are stevedore employees?

A They are stevedores that do this, yes.

Q What use is made of this over, short and damage report?

A It just tells you per vessel what cargoes were short delivered at the pier, what cargoes were over on the pier, and what was damaged.

Q If the stevedore was told that a consignee of cargo was short 781 bags of coffee, would you expect to see a notation to that effect in the over, short and damage report?

A Well, I don't know, in fact, if any claim was sent against them, but we put a claim right into Barber Lines.

Q Assuming the stevedore was told that it was missing some bags of cargo, 781, would you expect to find a notation to that effect on the over, short and damage report?

A Not necessarily, no; not if we are actively trying to find bags and trying to make substitution, which they were doing.

Q Assuming that the over, short and damage report was prepared a few months after the discharge of the vessel, would you expect to see some notation in the report at that time that there was something wrong?

A I really don't know whether they would put that in or not.

MR. HOOPER: I have no further questions.

RECROSS EXAMINATION

XXX BY MR. WARNER:

Q Over, short and damage, what happens to the over bags of coffee?

A Usually the carrier will sell it.

Q The shipowner sells it?

A Steamship company, yes.

Q And what does he do with the money, if you know?

A I would imagine that if he, like, for instance, if he's short 20 bags and over 20 bags another mark which

cannot be substituted, the proceeds should go to the consignee who is short. If not, usually they will keep the money and work the claims out later on.

Q How can you get an over?

THE COURT: By delivering to the wrong place.

A By cross-delivery, by putting --

Q Bad marks?

A Yes, yes, bad marks; discharging cargoes at New York that should be discharged at Philadelphia or Baltimore, and vice versa. It could happen either way; several ways it could happen.

Q During the course of your testimony I noted that you were referring to some documents before you.

Is one of them your letter of 17 January, 1972?

A My what, my letter of?

Q 17 January, 1972.

A 17th of January? No. I[illegible] my report of March 29th.

Q I show you a document which has been marked 16 for identification and ask you if that is your letter.

A Yes, it is.

Q Is the document that you have been referring to during your testimony this morning this one, which is 17 for identification?

A Yes, it is.

MR. WARNER: May these be deemed received in evidence, your Honor?

MR. HOOPER: What are the exhibit numbers?

MR. WARNER: 16 and 17.

THE COURT: Any objection?

MR. HART: No objection.

MR. HOOPER: No objection.

THE COURT: What did you do, make one list of all the exhibits common to all parties?

MR. WARNER: Yes, your Honor.

THE COURT: We will just consider it 16 and 17 received in evidence.

(Third-Party Defendant's Exhibits 16 and 17 received in evidence)

xxx

MR. WARNER: I have no further questions.

THE COURT: The plaintiff has rested subject to calling the man from Borchinius.

MR. HART: May I just ask a question of Mr. Hooper, your Honor?

Mr. Hooper, would you admit this letter was received by Barber Steamship Lines?

MR. HOOPER: Your Honor, I believe we'll have a witness. I'd rather have him say.

jkjw

MR. HART: All right. That has to do with some salvage. That's all.

THE COURT: All right, Mr. Hooper, call your witness.

MR. WARNER: Your Honor --

THE COURT: Do you want to say something?

MR. WARNER: Yes, your Honor. I assume plaintiff is relying on the bill of lading documents in support of his case.

I do feel I have an obligation to my client to make objections to them. His case against the shipowner is one thing and against me is something else again.

THE COURT: You are going to offer the bill of lading, Mr. Hart?

MR. HART: All right. Yes, your Honor, just a second.

(Pause)

end t2

T3 1 GWjw 1 36

2 MR. HART: I offer photostatic copies of
3 bill of lading No. 5 and bill of lading NO. 6 which were
4 marked Pittston's Exhibit for identification at depositions
5 heretofore taken.
6 THE COURT: What will be their exhibit
7 numbers here?
8 MR. WARNER: 20, your Honor.
9 THE COURT: Any objection?
10 MR. WARNER: Yes, your Honor. I object on
11 the grounds that these documents are hearsay in the first
12 instance.
13 Secondly, we are not party to the contract.
14 It is not an admission on our part.
15 THE COURT: That will be received in evidence.
16 (Plaintiff's Exhibit 20 for identification
xxx 17 received in evidence)
18 THE COURT: These are documents issued in the
19 ordinary course of business, I assume. There is no doubt
20 about them. The shipowner has not objected to them.
21 R A G N A R N I L S E N , called as
22 a witness called by defendants and third-party
23 plaintiffs, being first duly sworn, testified
24 as follows:
25

DIRECT EXAMINATION

XXX BY MR. HOOPER:

Q Captain, is English your native language?

A No, Norwegian.

Q Are you willing to testify in English?

A Yes, I will do my best.

Q We will try and go slowly and I believe he can testify without an interpreter.

What is your occupation? What is your job?

A I'm chief officer.

Q Were you chief officer of the vessel Toronto in 1971?

A Yes.

Q What licenses do you hold?

A I have captain's license.

Q From what government?

A Norwegian government.

Q How long have you been going to sea?

A Oh, since 1949, officer since '59.

Q How long have you been a chief mate?

A I have been chief mate since '67.

Q Captain, I would like to show you a deck log which we agree I believe is No. 59 in the list of exhibits.

MR. HOOPER: Is there any objection to receipt

of the deck log?

MR. HART: No objection.

THE COURT: What is the purpose of it?

MR. HOOPER: Just so we can refer to it during his testimony.

THE COURT: Why is it necessary to discuss the deck log at all? There is no question about what happened at sea, is there?

MR. HOOPER: No, your Honor.

THE COURT: No question about what was really off-loaded?

MR. HOOPER: Just the fact that the vessel proceeded from Assab to New York.

THE COURT: Is there any dispute about that?

MR. HART: Not on my part.

MR. WARNER: Excuse me, your Honor?

THE COURT: The question is whether there is any dispute that the vessel proceeded directly from Assab to New York.

MR. WARNER: No disoute on it.

THE COURT: Anything else you want the log for?

MR. HOOPER: I don't know at this time, your Honor. The captain may request to look at it during the

questioning.

THE COURT: What do you want to get from this witness? That's my question. It may all be stipulated.

MR. HOOPER: The fact all of the coffee was loaded on board the ship in Assab, the coffee for bills of lading 5 and 6.

THE COURT: There is no dispute about that, is there?

MR. HART: No, your Honor.

MR. WARNER: By me there is, yes.

THE COURT: All right. Proceed on that point.

MR. HOOPER: I believe we will need to use the log book.

THE COURT: All right.

Q Captain, could you tell me what that document is?

THE COURT: It is the deck log. He has already identified it.

MR. HOOPER: I would also like to offer at this time the hatch list, No. 41, and the cargo plan, No. 42.

THE COURT: Mr. Warner, have you seen these documents before?

MR.WARNER: Yes, your Honor, everything except the log book.

THE COURT: Is there any real question that the coffee was loaded on in Assab?

MR. WARNER: There is an honest question, yes, there is.

THE COURT: Go ahead.

(Exhibits 41 and 42 for identification

xx received in evidence)

Q Captain, were you the chief mate on board the ship when she loaded cargo at Assab, Ethiopia in 1971?

A Yes.

Q What were you duties as chief mate?

A Well, I was -- I am planning the loading and looking after it and also making the plan, the final plan.

MR. HART: Your Honor, as far as the plaintiff is concerned, I'll concede all his duties. I know what a chief made does.

THE COURT: We all do.

Go right ahead.

Q Captain, I would like to direct your attention to the stowage plan, the cargo plan, and ask whether you prepared that plan?

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A Yes, I prepared it. That is my plan.

Q Did you prepare that from records at Assab concerning the loading of the coffee?

A Yes, Assab as well as the other ports.

Q Can you look at that plan and tell me whether cargo was stowed in such a manner that all the New York cargo could be discharged from the vessel once she reached New York without moving any other cargo?

A Yes, I know it could.

Q How could a person going into the hatches of this vessel tell whether a bag of coffee was supposed to get off at New York or whether it was supposed to go somewhere else?

A Well, you can see it from the plan and you can see it from the hatch list as well.

Q Disregarding the plan and the hatch list, assume that a person looks at the cargo plan, then goes on to the ship to find the coffee that he's supposed to discharge, how is that coffee, New York coffee, separated from other coffee?

A We separate it different ways. We separate -- this trip we separate it by burlap.

Q In other words, you put big sheets of burlap between the cargo destined for New York and the cargo destine

for some other place?

A Yes.

Q Was there any other method you used to distinguis what coffee was to be discharged at New York?

A Yes, we used also colored tape and colored chaulk.

Q What did you do with the colored tape?

A We marked the whole surface. When one port is finished, we stopped loading and we covered it.

Q With tape?

A By small pieces of tape and each bag on top.

Q So the stevedores would finish unloading in New York and they would get down to a layer of bags with colored tape on them?

A Yes. Then they stop. Burlap is much better in my view.

Q You had burlap on this voyage?

A Yes.

Q Drawing your attention to the hatch list, did you prepare that?

A Yes.

Q That indicates all the cargo that was loaded on board the vessel at Assab?

A Yes, in Assab and different ports.

Q That indicates the condition of the Toronto when she sailed from Assab bound for New York?

A Yes.

MR. HOOPER: I would like to offer the manifest, Exhibit No. 56, into evidence.

Any objection?

MR. HART: No objection from the plaintiff.

MR. WARNER: No objection.

(Exhibit 56 for identification received in evidence)

xxx

Q I show you the manifest, Captain.

Do you recognize that document?

MR. HOOPER: I have now located the original. It might be easier for the captain to look through that.

THE WITNESS: Yes.

Q Do you know whether that document, No. 56, is the manifest for the Toronto on the voyage in question?

A Oh, yes, it is.

Q Could you tell us briefly what the purpose of the manifest is?

A That shows the whole cargo which is loaded in the ship, the whole cargo and the marks, the consignee and the senders.

Q Who prepares the manifest?

A This is the agent, normally the agent prepare it.

Q The agent in Assab?

A The agent in Assab and in different ports.

Q Prepares it?

A Yes.

Q Do you know whether that manifest is required by any government authority here in the United States?

A Yes, it is required by the government.

Q What happens if the manifest is not accurate?

A Well, it must be -- it has to be accurate.

Q Why is that?

A The custom required exact number of cargo which is in the ship. It must be always very correct.

Q What would happen if it wasn't correct?

A Well, there is penalty and fine.

Q From the government?

A Yes. That's a rule.

Q What would happen if the agent in Assab made up the manifest and found a mistake before the vessel sailed from Assab? What would he do?

A Well, if it was something wrong, which is very seldom -- I have never met it, but then they must telex so this can be correct before the ship enters an American

port. They must telex the correction to the manifest.

Q Before the coffee was loaded in Assab, did you have a chance to look at it?

A Yes. Yes, I have.

Q Where did you see it before it was loaded on board the vessel?

A Well, it was -- I have a photo of it. It was spread over the wharf.

Q Could I see that and the other photo you have?

A Yes.

MR. HOOPER: These two photographs were brought last night by the witness. They are not in the list of exhibits.

I would like to show them to counsel and offer them in evidence.

(Pause)

A The counting in Assab was very specific, very good.

THE COURT: Wait for a question.

MR. HOOPER: Any objection?

MR. WARNER: No objection.

(Exhibits 60 and 61 received in evidence)

xxx

MR. HOOPER: The exhibit showing the bags of

coffee has been marked 60, the exhibit showing the vessel has been marked 61.

THE COURT: May I see them?

(Pause)

THE COURT: Why did you take the pictures of the coffee on the pier?

THE WITNESS: This was because it delayed the ship in Assab, because it was made into squares and counted there by custom authorities and also the chief checker. Three men were tallying it.

THE COURT: All right.

Q All this sorting of the coffee in Assab delayed the sailing of your vessel?

A Yes.

Q Was the coffee piled up in the pier in Assab according to marks before it was loaded on the vessel?

A Yes.

Q Are the piles shown in Exhibit 60 an accurate representation of those piles in Assab according to marks?

A I don't understand.

Q In other words, does that picture show the coffee as it was piled up according to marks on the pier in Assab?

A Yes.

Q Could you tell me what 61 is?

A Well, this is the arrival condition here in New York.

Q That is of the vessel Toronto when she came into New York?

A Yes.

Q Incidentally, are you still employed by Barber Lines?

A No, I am in another company now for the last four years.

Q So you weren't ordered to come here by Barber Line? You are not employed by them.

A No.

Q Do you know how the coffee was loaded from the pier in Assab into the vessel, what method?

A Yes, by slings in equal amounts, each sling.

Q What do you mean equal amounts, each sling?

THE COURT: Sling number of bags?

THE WITNESS: Yes, equal amount of bags.

Q I see.

How long did you stay aboard the vessel after she arrived in New York?

A Well, only one day. I went for vacation the day after.

Q So you were not on board the vessel during her discharge in New York?

A No, I was not on board.

Q Are you satisfied that the number of bags of coffee shown in the vessel's manifest and in the vessel's stowage plan and in the vessel's hatch tally represent the number of bags of coffee which were actually loaded on board the Toronto in Assab?

A Yes, that was the number of bags.

MR. HOOPER : I have no further questions.

CROSS EXAMINATION

XXX BY MR. WARNER:

Q Exhibit 41, the hatch list, what were the documents you used to prepare that?

A Thisis made from the plan.

Q This, 41, is made from the cargo plan?

A Yes.

Q Which is 42?

A Yes.

Q All right.

Who made 42?

A I make them both.

Q You made them both?

A Yes.

Q All right.

What was the source of your information which is set forth in the cargo plan, 42?

A This is the mate's receipts and the tally sheets in Assab, in all ports.

Q Let's take Assab.

What is a mate's receipt in Assab?

A Mate's receipts in Assab -- that is -- well, that's the mate's receipts.

THE COURT: It is the same as the mate's receipts anywhere else?

THE WITNESS: Yes.

THE COURT: What is a mate's receipt? That is what he means to ask.

A That shows the mark and the number of bags and the tonnage.

Q Who prepares it?

A This is the agent.

Q The agent at Assab --

A Yes.

Q -- prepared a receipt?

A Yes.

Q Which shows the marks and the numbers?

A Yes. He prepared it from the tally, the chief

tally man, his record, and then they are prepared.

Q What I'm getting at, when you prepared 42, the cargo plan, did you have the tally sheets as well as the mate's receipts?

A Usually, yes. Otherwise the tally man, he is signing for the quantity according to the tally sheets.

Q No. My question to you, sir, is:

When you prepared Exhibit 42, which is the cargo plan, did you have before you the tally sheets that were made at Assab?

A Yes. As far as I know, yes.

Q Where are they today?

A What?

Q Where are they today?

A Well, this should be in the ship, but the ship is sold.

Q Did you have before you the mate's receipts?

A Always.

Q Always the mate's receipts?

A Yes.

Q Always the tally sheets, too?

A Nearly always the tally sheets.

Q All right.

A That must follow. That is usually pinned to the

mate's receipts.

Q Has it ever turned out in your years as chief mate, that when you arrived at the destination, that the cargo that is described in the mate's receipt is not on board the vessel?

A No.

Q Never happened?

A No.

THE COURT: Have you ever had to dump cargo in order to save the ship?

THE WITNESS: No.

THE COURT: Never had to do that either?

THE WITNESS: No.

THE COURT: All right.

Q Do you have a copy of the cargo plan before you, sir?

A The cargo plan?

Q Yes, 42.

A Yes.

Q This action involves two bills of lading, 5 and 6: Assab/New York; Option, Baltimore.

I ask you to look at the cargo plan and tell us where in your opinion that coffee was stowed in the Toronto in August of 1971.

A It would be in Hatch No. 1, 2, 3 and 4.

Q I cannot hear you. It would be in Hatch No. 1 in the 'tween deck or where?

A In the lower 'tween deck, No. 1.

Q The forward end or where?

A In the square of the hatch.

Q In the square of the hatch?

A Yes.

Q How many bags were in the No. 1 lower 'tween deck?

A 1,667.

THE COURT: It might be 1,682. You can't really see.

THE WITNESS: The manifest gives that.

THE COURT: 1,667, all right.

Q Where else in the vessel?

A Where else in the vessel?

Q Yes.

A In Hatch No. 3, 2 and 3. There is an entrance through there. In Hatch No. 3.

Q What part of No. 3, sir?

A That's the lower 'tween deck, forward part.

Q How many bags in that area?

A 8,115.

Q The lower 'tween deck?

A Yes, in the lower hold.

Q How many bags in the lower hold?

A 1,670.

Q I'm talking about Assab.

A Only from Assab, you mean?

Q Yes.

A Nothing in the lower hold, only the lower 'tween deck.

Q Again, is there any more Assab/New York; Option Baltimore in the vessel?

A Yes, in No. 4 lower hold.

Q How many bags, please?

A Forward part, 4,036.

Q Any more?

A Yes, in the after part.

Q In the what, sir?

A In the after part, No. 4 after part.

Q How many bags?

A 1,232. That's all, as far as I can see.

Q That's all?

A Yes.

Q All right.

In No. 1, the Assab, Option New York to Baltimore

was stowed adjacent to the Baltimore cargo, was it not?

A Yes. There it was separated by burlap.

Q Who put the burlap in there?

A That's the ship. That's the ship who did that always, by one office, duty officer, and crew members. We stopped the loading and do the separation.

Q No. 2, was the Assab, optional New York to Baltimore, stowed next to Baltimore cargo?

A No. 2 and 3, that's the same, the same hatch you can see. You can discharge it from No. 2 or No. 3. That is a compartment by itself, no cargo in between.

Q My question is: It was stowed adjacent to, next to the Baltimore cargo?

A No.

Q No?

A No. This is actually a receiver chamber.

Q In No. 4, the Assab, optional New York to Baltimore, was that stowed adjacent to and over Baltimore cargo?

A Adjacent to optional New York, Baltimore underneath.

Q What was underneath it?

A That was also New York, Baltimore optional, but that was Djbouti.

Q And in No. 5, what was stowed next to the Assab/ New York --

A No. 5 is nothing.

Q Nothing?

A No. 5 and 6, nothing. But in the after part, No. 4, that is adjacent to Baltimore cargo underneath.

Q What does New York optional Baltimore mean to you?

A That means it must be ready to discharge either in New York or Baltimore.

Q How do you know whether to discharge it in New York or Baltimore? When is that decision made and by whom?

A That decision is made by the Barber Line for this company. They send the cable to the ship or sometimes before we arrive. It all depends where it shall go.

Q As I recall your testimony, the day after the vessel arrived in New York you left on holiday; is that correct?

A That's right.

Q So you did not witness the discharge of the vessel?

A No.

Q You don't know where she went after that?

A No.

Q When did you return to the vessel? Did you ever return to the Toronto?

A Not Toronto, but another ship in the same company. We seldom come back to the same ship.

Q Thank you, Captain.

THE COURT: Any further examination of this witness?

Thank you.

(Witness excused)

MR. HOOPER: Your Honor, my other witness is down at 17 Battery Place, on his way up here.

THE COURT: How long ago did he leave there?

MR. HOOPER: Just a few minutes ago.

THE COURT: Is there a witness we can take out of turn? It is rather early to break for lunch.

Do you want to take a witness out of turn, Mr. Warner?

MR. WARNER: Thank you, no, your Honor.

THE COURT: Do not thank me. I was asking a favor.

All right. I guess we have no alternative but to break for lunch.

MR. WARNER: May I suggest: Maybe we can

agree on some of these exhibits that we have marked and get that done with.

THE COURT: You do not need me on that, do you? Can counsel agree among themselves?

MR. HART: I think so.

MR. HOOPER: Yes.

THE COURT: Use the time then.

How long will that take?

MR. WARNER: We have about 60. It would probably take us a good half hour.

THE COURT: All right. Then we will break until 2:00 o'clock.

MR. WARNER: Any objection to 1?

MR. HOOPER: No objection.

MR. WARNER: Any objection to 2?

MR. HOOPER: No objection to 2.

MR. WARNER: 3?

MR. HOOPER: No objection.

MR. WARNER: 4?

MR. HOOPER: No objection.

MR. WARNER: 5?

MR. HOOPER: I will not agree to No. 5 at this time.

MR. WARNER: No. 6?

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MR. HOOPER: No objection.

MR. WARNER: 7?

MR. HOOPER: No objection.

MR. WARNER: 8?

MR. HOOPER: No objection.

MR. WARNER: 9?

MR. HOOPER: I object to 9 at this time.

MR. WARNER: 10?

MR. HOOPER: No objection.

MR. WARNER: 11?

MR. HART: I only object to 11 on the basis of the computations in there, that they are not the final report of Force Company.

MR. HOOPER: I have no objection.

MR. WARNER: 12?

MR. HOOPER: No objection.

MR. WARNER: 13?

MR. HOOPER: No objection .

MR. WARNER: 14?

MR. HOOPER: No objection.

MR. WARNER: 15 is in, 16 is in, 17 is in. 18?

MR. HOOPER: No objection.

MR. WARNER: 19 is in already. 20 is in

already.

MR. HOOPER: No objection to 19.

MR. WARNER: 20 is in.

21?

MR. HOOPER: No objection.

MR. WARNER: 22?

MR. HOOPER: No objection, although it is duplicative.

MR. WARNER: 23?

MR. HOOPER: This is the same thing. It is in already.

MR. WARNER: 23 is out.

24?

MR. HOOPER: 24 is in already.

MR. WARNER: 25 and 26 are in no way or another.

MR. HOOPER: They are in already.

MR. WARNER: This is in already, 27.

MR. HOOPER: Okay. Let's leave that out then.

Is that handwritten one in?

MR. WARNER: Do you want 27 in?

MR. HOOPER: Yes.

MR. WARNER: 27 is in.

28?

MR. HOOPER: No objection.

MR. WARNER: 29, 30, 31, telexes from your people.

MR. HOOPER: Objection.

MR. WARNER: 32?

MR. HOOPER: No objection.

MR. WARNER: 33?

MR. HOOPER: No objection.

MR. WARNER: 34?

MR. HOOPER: No objection.

MR. WARNER: 35?

MR. HOOPER: No objection.

MR. WARNER: 36?

MR. HOOPER: I have no objection to this.

MR. WARNER: 37?

MR. HOOPER: Will you agree, Mr. Warner, that 36 is the same as 29, 30 and 31? It will eliminate the necessity of the Judge reading through all that.

MR. WARNER: All right.

MR. HOOPER: I have no objection to 37.

MR. WARNER: 38?

MR. HOOPER: No objection.

MR. WARNER: 39?

MR. HOOPER: No objection to 39, but I think it is cluttering the record. I have no objection.

MR. WARNER: 40?

MR. HOOPER: I have no objection.

MR. WARNER: 41 and 42 are in already.

43?

MR. HOOPER: Objection.

MR. WARNER: 44?

MR. HOOPER: Same objection to 44.

MR. WARNER: 45?

MR. HOOPER: Objection.

MR. WARNER: 46 is in already.

47?

MR. HOOPER: I think that is in already, but I have no objection.

MR. WARNER: 48?

MR. HOOPER: Objection.

MR. WARNER: 49?

MR. HOOPER: Objection.

MR. WARNER: 50?

MR. HOOPER: I have no objection to 50.

MR. WARNER: 51, we have agreed it is out.

52?

MR. HOOPER: No objection.

MR. WARNER: 53?

MR. HOOPER: No objection.

MR. WARNER: 54?

MR. HOOPER: No objection.

MR. WARNER: 55, we agree not to put it in.

56 is already in.

57 and 58 are the bills of lading. They are already in.

Counsel have agreed that the documents which are described in the pre-trial order in this matter may be received in evidence subject to the objections that were made on the record here.

(Luncheon recess)

end t3

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Tlpm 1 HPjw 1

2 AFTERNOON SESSION

3 2:05 P.M.

4

5 MR. HOOPER: Mr. Herbert.

6

7 OTIS ROBERT HERBERT, called

8 as a witness by defendants and third-party plaintiffs,

9 being first duly sworn, testified as follows:

10 DIRECT EXAMINATION

XXX 11 BY MR. HOOPER:

12 Q By whom are you employed?

13 A Barber Steamship Lines.

14 Q How long have you been employed by Barber?

15 A About twenty-one years.

16 Q What is your position now?

17 A Inwood freight manager.

18 Q How long have you been the Inwood freight

19 manager?

20 A. Approximately six years.

21 Q You were the Inwood freight manager in 1971?

22 A Yes.

23 Q Would you tell us the duties of the Inwood

24 freight manager?

25 A Compiling manifest received from the other

side on cargoes loaded on board ships.

Q What do you mean by "the other side"?

A Loading ports. Setting out freight bills, collecting freight bills of lading, releasing cargo.

Q What do you mean by "releasing cargo"?

A Notifying the pier that the freight has been paid, the original bill of lading has been surrendered and as far as we are concerned it is all right to be picked up.

Q How do you notify the pier of this fact?

A By telephone and teletype.

Q And by pier, do you mean the stevedore?

A Yes.

Q So when the bill of lading is surrendered to you by the consignee, and you know the freight has been paid, you call up the stevedore and say it's okay to deliver this cargo to thisconsignee?

A That is correct.

Q What does the consignee have to show the pier that he has a right to certain cargo?

A The delivery order, presumably the permit.

Q Who gives him the delivery order?

A He gets the original bills of lading and makes up his entry.

Q He gets the original bills of lading and he makes up the delivery order from the information on the bill of lading?

A That is correct.

Q Are you familiar with an over, short and damage report?

A Somewhat, yes.

Q Could you tell us the purpose for that document? I will show you the over, short and damage report which has been agreed to be in evidence as Exhibit No. 21, and direct your attention to page 4, code numbers 89 and 90.

Can you tell us what bills of lading they represent?

A New York, Baltimroe optional, delay No. 5 and No. 6.

Q Can you tell me when that over, short and damage report was prepared?

A It's dated January 5, '72.

Q What does it indicate with regard to Assab bills of lading No. 5 and 6?

A No. 5 is two bags short, No. 6 48 not found and a notation 42 delivered.

Q In other words, leaving a balance of 6 bags

short?

A That is correct.

Q The stevedore told you in January 1972, according to that over, short and damage report, that all the cargo carried on the bills of lading 5 and 6 was discharge d and delivered with the exceptio.. of six bags from bill of lading 6 and two bags from bill of lading 5?

A That's correct.

Q We have had some testimony here this morning about bill of lading No. 7.

What does the over, short and damage report show as to bill of lading No. 7?

A It shows 59 short, several delivery date for so many bags, a total of 45 delivered, which to me would indicate 14 were never delivered.

Q I show you Exhibit 54, which counsel have agreed to receive in evidence, which is the delivery book and draw your attention to page 88 of that book.

Can you tell me what bill of lading page 88 covers?

A Yes, New York optional Baltimore No. 4.

Q I'm sorry, page 89. What bill of lading is that?

A New York optional Baltimore No. 5.

Q What bill of lading is covered by page 90?

A New York, Baltimore, No. 6.

Q Page 91?

A No. 7.

Q Do you recall any of the circumstances surrounding the delivery of the cargo under bills of lading 5 and 6?

Let me put it this way: Do you remember delivery of cargo under 5 and 6 in 1971?

A I don't remember the specific bill of lading.

Q It was testified this morning that the wrong cargo was delivered to Sprague & Rhodes Company.

Do you remember anything about the delivery of cargo to Sprague & Rhodes Company? Do you remember anything about the delivery of cargo to Sprague & Rhodes Company in September, October 1971?

A I remember an incident where Sprague & Rhodes ordered a Davies truck in to pick up some coffee. After they picked it up they advised me they had the wrong marks or some of the wrong marks.

Q Who advised you they had some of the wrong marks?

A The trucking company.

Q Do you remember what they told you at that time?

A They said they wanted to return them to the pier. However, this was the day before or two days before the pier was due to go on strike.

Q What did you do?

A I suggested they put it in the warehouse, and then we could find out to whom it belonged, deliver it from the warehouse and mark the record accordingly.

Q Did you find the rightful owner?

A Carl Borchinius.

Q What did you do with this coffee, what was done with this coffee?

A I called up a Mr. Danny Grunwald with that company and told him where the coffee was and he made arrangements to pick it up.

Q How long had you been dealing with Mr. Daniel Grunwald?

A Eighteen, twenty years.

Q How long have you been dealing with Carl Borchinius?

A Same length of time.

Q How many coffee buyers do you deal with?

A Coffee buyers?

Q People that import coffee into the United States.

A Ten, twelve.

Q Do you know the reputation of Carl Borchinius within the community of coffee importers?

A To the best of my knowledge, they are honest.

Q If Carl Borchinius was to receive an extra 700 something bags of coffee, what would you expect them to do?

A I would expect them to call me up and say I got too much coffee.

Q You wouldn't expect him just to keep it and say nothing?

A No, sir.

Q Did you receive a claim from Carl Borchinius before you gave them the correct coffee?

A For a number of bags. I couldn't tell you how many at the moment.

Q I draw your attention to, I believe page 91 in the delivery book. This morning there was some testimony about the wrong marks in the manifest, bill of lading 7 instead of to Djimmas.

Do you notice any change on that page 91 concerning Gimbi and Djimmas?

A Yes. Gimbi has been crossed out and Djimmas written in.

Q Do you know who crossed that out?

A No.

Q When the truck driver came down to the pier to pick up cargo under bill of lading No. 7, what would he have with him to identify his coffee?

A Delivery order.

Q That delivery order would be made from the bill of lading?

A That is correct.

Q If that bill of lading showed Djimmas the delivery order would show Djimmas?

A Yes, presumably, yes.

Q What should the stevedore clerk have done when he received the delivery order for Djimmas coffee and he had a delivery book which listed Gimbi coffee?

A Well, he should have checked his manifest or he could have called and asked asked what the original bill of lading said.

Q Is it possible that he could have made that change on the delivery book?

A Yes.

Q If the Toronto had come in and discharged coffee and had been 700-some odd bags short at the discharge at the pier, what would have happened?

A The pier would have called first of all to say the coffee didn't come from the ship.

Q Do you know if the pier did call in this instance?

A I didn't.

THE COURT: I might say anyone in the back of the room who is having trouble hearing becasue counsel is not speaking very loud and there is outside noise, you can feel free to take any seats in the jury box.

MR. HOOPER: I have no further questions at this time.

CROSS EXAMINATION

XXX BY MR. HART:

Q Mr. Herbert, under bill of lading No. 5 which was received in evidence, 998 bags of Gimbi coffee was to be delivered.

Under bill of lading No. 6, which was also received in evidence, 1101 bags were to be delivered making a total of 2,099 bags.

Now, can you tell me of that total how many bags of Djimmas coffee was delivered to the Center in Port Elizabeth, New Jersey?

THE COURT: You mean under bills of lading 5 and 6?

MR. HART: Under bills of lading No. 6.

A I would say about 1,000 bags.

Q Can you tell me of Gimbi coffee and Djimmas coffee, how many of that 1,000 bags were delivered?

THE COURT: I do not think the question makes sense. Rephrase the question.

Q Under bill of lading No. 5, 998 bags were to be delivered. Under bi-l of lading No. 6, 1101 bags of Gimbi coffee were to be delivered, making a total of 2,099 bags.

Now, can you tellme how many of those bags of Gimbi coffee were delivered to the Center in Elizabeth Port?

A No.

Q You can't?

A No.

Q I understand from the bills of lading that two certificate numbers were 2, 3, 4, 5, 6, 7, 8, 9.

What were the markings under the Djimmas coffee? Were they also 2, 3, 4, 5, 6, 7, 8,9?

A I don't know.

Q Did you have a conversation with Mr. Borchinius, or Mr. Grunwald, I believe it was?

A Yes.

Q What did he say to you and you say to him about the Djimmas coffee?

A The only thing I could recollect talking to Mr. Grunwald about, we had some coffee in the warehouse that had his mark on it and it was available for pickup.

THE COURT: In what warehouse?

THE WITNESS: At a warehouse, to my recollection, in Jersey City.

THE COURT: Did you tell him how many bags?

THE WITNESS: I did, sir. I had a file on it but unfortunately we renovated and everything is gone.

Q Do you recall how many bags of Djimmas coffee he received in return from the Lehigh Distribution Center?

A No, I don't.

Q But he told you that there were bags of Djimmas coffee out at the Lehigh Distribution Center?

A No, I told him that.

Q But you haven't anything to show how many bags were there, any records?

A No, I don't.

Q You recall there was a strike on the pier from October 1st until November the 13th?

A Right.

Q Did you go down to the pier at any time after

the strike?

A No.

Q So you don't know after October 1st what coffee was or was not returned to the pier?

A No, I do not.

Q Did Mr. Borchinius tell you that he had picked up any Djimmas coffee from the Lehigh Distribution Center?

A Yes, he did.

Q You don't know how many bags he picked up?

A I would say in the neighborhood of two, 300 bags, but I couldn't make it any closer than that.

Q Did you have any correspondence with Mr. Borchini about this coffee?

A Yes, I did.

Q I show you a letter dated January 4, 1972 of the Barber Steamship Lines, a copy I should say of a letter, and ask you would this in any way refresh your recollection as to the number of bags that were picked up at the Lehigh Distribution Center?

MR. HOOPER: I have no objection.

Q Would you look at that letter, please.

A I recall this letter.

THE COURT: You recall what?

THE WITNESS: This letter.

Q Refreshing your recollection from that letter, could you say how many bags?

THE COURT: Do not tell us unless the letter really refreshes your recollection. We can all read the letter; reading the letter does it in fact refresh your recollection?

THE WITNESS: No. I know what he says here but I couldn't be sure.

MR. HART: I am going to offer the letter in evidence.

MR. HOOPER: No objection.

(Exhibit 62 for identification received in evidence)

xxx

Q Now, I show you a letter, copy of a letter, dated March 22nd, 1972, from Borchinius to Barber Steamship Line, Inc. and ask you if this refreshes your recollection as to the bags of coffee shipped on the bill of lading No. 6 to Borchinius.

(Pause)

MR. HART: I will withdraw the question and I will ask you this question.

Q Refreshing your recollection from the March 22, 1972 letter from Borchinius to Barber Steamship Line, could

you tell me how many bags of coffee came in on bill of lading No. 6, Djibuti to New York of Djimmas coffee?

A I would have to look at the record.

Q Do you have any records here?

A 1670.

end tl

T2 pm

Q All right.

MR. HART: I'm going to offer that letter in evidence.

MR.WARNER: No objection.

(Exhibit 36 for identification received — sh be 63 - Pl.f

xx in evidence)

Q Mr. Herbert, there has been testimony given here this morning that it was 781 bags of Gimbi coffee, non-delivered to the Lehigh Distribution Center.

Am I correct in saying that your recollection from the correspondence, the plaintiff's exhibit there, that 437 bags of coffee were returned to Borchinius?

A I know what it says in the letter, but I couldn't testify that that was it.

Q You can't say how many bags were returned to Borchinius?

A No, I could not.

THE COURT: Did you prepare delivery orders for those bags?

THE WITNESS: Yes.

THE COURT: So that Borchinius could pick them up at the Lehigh warehouse?

THE WITNESS: Yes.

CROSS EXAMINATION

XXX BY MR. WARNER:

Q Mr. Herbert, as I recall your testimony, very late in September, the last couple of days in September, just before the strike, and the strike came on the 1st of October, you received word that there had been a cross-delivery of coffee at the Lehigh Terminal; is that correct?

A That is correct.

Q You cannot recall how many bags have been cross-delivered?

A No, I cannot.

Q From whom did you get this first word?

A From the trucking company.

Q From the trucking company?

A Yes.

Q They were still on the trucks at that time when you got word?

A Yes.

Q When you got word from them, you told them to put them in a warehouse.

Do you recall what warehouse?

A I don't know. I can't be sure. I keep saying Jersey City because it sticks in my mind.

Q All right.

Did you ever have any conversations with anyone from Albert R. Lee Company regarding the same episode that we have been talking about?

A Not that I can recall.

Q Did you discuss the cross-delivery with anyone in Barber at the time you received word from the trucking company?

A No.

Q Did you advise Pittston of the cross-delivery?

A Yes.

Q How?

A By telephone.

Q To whom?

A I would have to say their office. I couldn't give you a name because the pier was closed.

Q Did you make any arrangements for entries to be made in the delivery book maintained by Pittston to reflect this cross-delivery and the storage in the warehouse?

A Did I make any arrangements?

Q Yes.

A No, I did not.

Q I think you testified a few moments ago about a delivery order.

What did you have to do with the delivery order?

A If the cargo was put in a warehouse, it would be put in there for Barber Lines' account.

Consequently, in order for anyone to remove it from the warehouse, there had to have been a delivery order issued by Barber Line.

Q Who paid the warehousing charges?

A Barber Steamship Lines.

Q Barber paid for that?

A Yes.

Q It is your recollection that thecoffee that had been stored in the warehouse was ultimately delivered to Borchinius?

A Yes.

Q On what bill of lading was this coffee applied?

A I don't know.

Q Is it fair to say you can't remember the number of bags, you can't remember the bill of ladings to which it was applied?

A It certainly is.

THE COURT: Any redirect?

MR. HOOPER: A few questions, your Honor.

REDIRECT EXAMINATION

XXX BY MR. HOOPER:

Q Mr. Herbert, you were just asked by Mr. Warner whether or what arrangements you made for any change of entries in the delivery book.

Who would make entries in the delivery book?

A The delivery clerk.

Q Who does he work for?

A The stevedore, in this case Pittston.

Q I would like to find out just what the relationship between the stevedore and Barber Lines was.

Assume that the Toronto arrived at Pier 9-A, Brooklyn.

What did you expect the stevedore to do?

A Discharge the cargo, sort it out and deliver it.

Q Discharge the New York cargo from the ship?

A Right.

Q Sort it out on the pier?

A Right.

Q And deliver it to the right people?

A That is correct.

Q Did you depend on the stevedore to do this?

A Yes, sir.

Q There was some testimony, too, that the coffee when it was on its way from the Sprague & Rhodes warehouse to Borchinius stayed in the warehouse at Barber Lines account.

Was the pier opened at that time, the stevedore pier opened at that time?

A No.

Q It was closed because of the strike?

A Because of the strike.

Q So you couldn't have taken that coffee back to the pier?

A Couldn't have taken it back to the pier, no.

MR. HOOPER: I have no further questions.

MR. HART: One final question.

RECROSS EXAMINATION

XXX BY MR. HART:

Q Mr. Herbert, have you any record or from your own recollection, can you tell us whether all the Djimmas coffee that was sent to the warehouse under bill of lading No. 5 and 6 was returned to Bochinius?

A No.

THE COURT: All right. Thank you.

(Witness excused)

MR. HOOPER: I would like to call Captain

Wheeler.

W I L L I A M W H E E L E R , called as a witness by defendants and third-party plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

XXX BY MR. HOOPER:

Q Captain Wheeler, what is your occupation?

A I'm presently self-employed as a marine surveyor, marine consultant.

MR. WARNER: May it please the Court, if the Court is familiar with Mr. Wheeler -- I'm sure all counsel are -- I would be willing to waive his qualifications.

THE COURT: All right. I will accept him as qualified.

MR. HOOPER: Thank you.

Q Could you briefly describe the stevedore's duty to discharge from a ship? What does a stevedore have to do?

A The stevedore or the terminal operator as he is variously referred to contracts with the ship operator to receive or to unload the cargo from the ship, to place it in the transit shed and to deliver it, to sort it and to deliver it as per the marks contained on the various documents, principally the bill of lading.

Q Would you expect the stevedore or the terminal operator or someone in his employ to search a vessel's holds and make sure all coffee for, say, New York was out of the vessel before she left New York?

A If he had any doubts and he's provided by the ship operator with a cargo plan showing the disposition of the cargo in the ship and if there is any doubts in his mind, yes, he initiates a search to locate it.

Q It is his job to get all that cargo out of the ship?

A It is; yes, sir.

Q You stated that the stevedore was also to sort cargo.

A Yes.

Q What does that entail?

A Sort means to sort the individual packages of cargo. You could either sort to the head mark -- that's the principal mark on the bill of lading -- usually the initials or the name of the consignee or something indicating ownership, and within the head marks there are sometimes and frequently chop marks. There will be a sequence of numbers under one chop or there will be, say, bags from one to 500 to be delivered to one location, bags from 500 to 1,000 to be delivered to another location.

So you have to sort -- the terminal operator has to sort depending on the instructions of the ship operator to the head marks at least or even to the chop marks.

Q Are you familiar with a document known as an over, short and damage report?

A As it is used on terminals; yes, sir.

Q What is it?

A It means overages on any consignment of cargo or shortages on a particular consignment of cargo.

THE COURT: Who has the responsibility for preparing it?

THE WITNESS: The terminal superintendent maintains the over, shorts and damages.

THE COURT: He is an employee of the stevedore?

THE WITNESS: Yes, sir.

Q If a vessel failed to discharge 780 bags of coffee to a pier, would you expect that shortage to turn up in the over, short and damage report?

A Definitely; yes, sir.

Q If it did not turn up in the over, short and damage report, would you assume that the correct amount was discharged from the ship to the pier?

A It means it is not short, it is not over and

there's no damage.

Q I would like to explore the area of cost deliveries.

A Yes, sir.

Q Assume that coffee was discharged from the pier by the stevedore to the wrong consignee, the stevedore delivery book indicated that the coffee went out of the pier to the consignee and later the stevedore was told that it delivered the wrong coffee.

Would you expect the stevedore to make any entry in the delivery book concerning that cross-delivery?

A Yes, sir. The cross-delivery would have to be corrected. There are two elements of a cross-delivery. They would have to be reconciled, recrossed and the customs would have to be notified, customs on the pier, and there would be a lot of -- quite a few records would have to be reconciled or corrected.

Q In other words, the stevedore would have to find out what happened and change his book to indicate that?

A Yes. The cross has to be traced down and corrected or if it is the same commodity within the mutual consent of the consignees, if it is equal -- like bags of coffee, they frequently will keep it, the proper

1 number.

2 Q If the consignees were not going to keep them,

3 they wanted to get the correct marks?

4 A That's their option. If they want their

5 property, they are entitled to it.

6 Q Then that should be indicated in the delivery

7 book?

8 A Yes, and the cost would have to be borne by the

9 terminal operator, the extra trucking charges and the

10 handling charges.

11 Q What is done with the delivery book after the

12 stevedore discharges the entire ship and delivers all the

13 cargo?

14 A It is put into the file for that ship, for that

15 discharge ship. It is maintained in the records warehouse.

16 MR. HOOPER: I have no further questions at

17 this time.

18 MR. HART: I have no questions.

19 THE COURT: All right, Mr. Warner.

20 CROSS EXAMINATION

21 BY MR. WARNER:

22 Q In answer to your hypothetical about making

23 entries in the delivery book, the basic premise, of

24 course, the stevedore has to be t-ld that they made a cross-

25

delivery.

A If he doesn't know it himself.

Q If he doesn't know it himself he has to be told?

A Yes. The trucking company would be the one to know it. The driver would be receiving cargo that is not his. The trucking company has made an oversight and the stevedore has made an oversight concurrent with each other.

Q Would you say the trucking company has a duty when it takes delivery to make sure that he gets the proper marks and numbers?

A Yes, sir. The trucker is the agent of the consignee. He's the -- he's assigned to go and pick up the cargo. He should be able to pick up the proper cargo.

Q To answer your hypothetical properly you have to know whether or nto the stevedore was told there was a cross-delivery?

A Who would have to know?

Q Somebody would have to tell him?

A Yes.

Q He couldn't pick it out --

A Whoever discovered it would have to tell the principals involved in executing the cost delivery.

Q You will agree if no one told the stevedore,

there would be no need for him to make an entry?

A Right. He would never have told him.

Q He would never know it?

A That's right.

THE COURT: That isn't to say he hasn't made a mistake?

THE WITNESS: That's right.

THE COURT: He made a record of having delivered certain cargo to a certain trucker and he has delivered something else.

THE WITNESS: Yes.

THE COURT: He just does not know he has made a mistake.

All right.

Q You were discussing the discharge of a vessel with coffee in the Port of New York.

A Yes, sir.

Q Are the bags tallied as it comes out of the hatch or over the rail on to the pier?

A There are two concepts or two methods.

One is where a hatch talley is maintained and the bags are tallied out of the ship, just as they were tallied into the ship at the port of loading.

Then the other concept is that that is an

unnecessary procedure and then we will have to tally them anyway when we load them on the truck. The truckloading tally is the one that is done on present day concepts and the hatch tally is -- because of the high cost of labor and time, the hatch tally has been discontinued for the last ten or fifteen years.

Q In 1971 there was no such thing as a hatch tally in the Port of New York?

A I don't think so. Some piers do still maintain a hatch tally.

Q If there were, therewould be an extra charge for it?

A Yes. There's an extra checker, there's extra time, extra handling.

THE COURT: There is no tally made until the goods are loaded on to a truck?

THE WITNESS: Between the tally in the ship and the time it is loaded on the port, no, sir.

THE COURT: All right.

Q You were talking about over, short and damage.

Is there in the stevedoring trade a custom as to percentage when you are dealing say with 60,000 bags of coffee that is accepted?

A Yes.

Q What is it?

A I think I know what you are driving at.

Q What is it?

A Roughly when it is cartons of the same commodity or barrels of olives or bails of cork, whatever it may be, two percent; between 2 and 3 percent would be an accepted degree of shortages or damages to be expected in a consignment.

THE COURT: Damages?

THE WITNESS: Combination, shortages and damages.

Q Two percent?

A Yes, about two to three percent.

Q Is that applicable with respect to bag coffee as well?

A In my experience, yes, sir. That is torn bags, bleeders, slack bags, damage bags, wet bags, short bags. Very seldom do you get overages.

Q You are familiar with New York optional Baltimore?

A Yes.

Q You are familiar with that?

A Yes, sir.

Q That means that the cargo is placed on the vessel and it can be discharged either at New York or at Baltimore

depending upon the wishes of the consignees?

A That's right.

Q All right.

Because it is optional discharge it has to be stowed in proximity to the Baltimore cargo in this case.

A In such position when it would be available either at New York -- readily accessible either at New York or at Baltimore. It doesn't have to be adjacent to either. It could be by itself.

Q Is it unusual in the trade for cargo which is stowed optionally, New York, Baltimore, to be over-carried to Baltimore when it should have been taken out in New York?

A This is what the over, shorts and damage report is originally when it is maintained by a steamship company. Original means over-carried, short-landed or damaged.

As it is maintained by a terminal, it means overages, shortages and damages. It is not unusual for a ship to over-carry and it is not unusual for a ship to short-land. When it is done, everybody knows it. There are expenses incurred afterwards that someone is to blame.

Q Despite the separations that are put in, it is run of the mill, you get over-carries to Baltimore?

A I wouldn't say run of the mill. It does happen.

It is not usual. It is unusual.

THE COURT: Whose responsibility is that?

THE WITNESS: From the ship?

THE COURT: Yes. Suppose the consignee said as to this optional New York or Baltimore cargo we want it off-loaded in New York. It is not off-loaded but goes on to Baltimore.

Whose fault is it?

THE WITNESS: The steamship operator has to truck it back to New York or else put it on the next ship coming back.

THE COURT: The stevedore unloads the ship, isn't he the one that is supposed to make sure that all of the New York cargo gets off in New York and isn't carried on to Baltimore?

THE WITNESS: He's provided with the cargo plan and within the limits of that cargo plan he should -- he has to assure himself that he has taken the cargo off the ship.

In the days when we had the hatch tally, then he knew precisely at the moment the ship finished or the hatch finished, he knew what cargo he had.

Present day operation isn't of that hatch tally. It would have the tally at the truck. Really the hatch

tally -- once you tallied it inot the hatch at the loading port, the hatch tally or discharge would be superfluous.

THE COURT: Assuming it is loaded in the right way so there is a clear distinction between New York and Baltimore cargo.

Where the cargo is optional, that is, you can off-load it either in New York or Baltimore, then how does the stevedore know that he's getting all the cargo that ought to come off in New York?

THE WITNESS: By reference to the cargo plan. The option is shown on the cargo plan. If it was over-stowed, that could be shown on the cargo plan. If it was New York cargo completely blocked in with Baltimore, if it was that -- that is different than an optional. That's an over-stowage.

THE COURT: Is that the responsibility of the stevedore or is there somebody there from the ship who says: Wait a minute, don't forget that, that's New York cargo, too?

THE WITNESS: To agree it's a joint effort. The stevedore is being paid. Without the hatch tally, he's being paid by the manifest ton and the number of tons that's on the manifest. He gets paid so much per ton. It is up to him to see that he does it.

THE COURT: If he makes a mistake and the cargo gets carried to Baltimore by mistake, you say the shipowner stands the --

THE WITNESS: No, I say the stevedore will have to make good the cost.

THE COURT: That is what I did not understand. I thought you said the shipowner would have to do it.

THE WITNESS: The hypothetical that you gave me involved -- while it was aboard the ship, the consignee notified the ship operator that he wanted the cargo to Baltimore and not -- New York and not Baltimore, but it was over-carried. That's the stevedore.

THE COURT: Even though the cargo plan was changed?

THE WITNESS: The change would have been executed before the cargo was discharged. In that case -- if everything went along with your hypothetical, the ship operator would be -- would have to pay the bill.

THE COURT: Even though the shipowner changed the cargo plan so that there was no longer marked as optional New York, Baltimore, but it was changed to read New York and gives that amended cargo plan to the stevedore?

THE WITNESS: Then it is the stevedore's

1 responsibility to see that that optional cargo was landed
2 at its correct desitnation.
3 THE COURT: All right.
4 Q Captain, when you were before the mast sailing
5 as chief officer, did you go down in the hatches before you
6 left the Port of New York and check and make sure all the
7 New York cargo was out --
8 A Yes, sir.
9 Q You did?
10 A Yes, sir, to satisfy myself.
11 Q If you didn't do it, you sent one of your
12 officers down?
13 A Sometimes I would miss things, yes.
14 Q And since you had the peculiar knowledge of the
15 ship, you had prepared the cargo plan and you knew where the
16 over-stowage and the under-stowage and everything else was,
17 and you checked it out yourself?
18 A Yes, in general. Principally I don't -- a chief
19 officer doesn't always prepare the cargo plan. That's
20 prepared by the stevedore at the final load of port -- the
21 final port of loading usually.
22 THE COURT: Does that expression, before the
23 mast, apply to the chief officer?
24 THE WITNESS: No, sir.
25 THE COURT: I didn't think so.

end t2

2 Q In addition to your sea time, I know you spent
3 many years on shore, stevedoring.
4 A Yes, sir.
5 Q How is a delivery book made out? What is the
6 basic document that forms --
7 A The manifest.
8 Q Does the stevedore ever see the bills of
9 lading?
10 A On occasion, yes. The material on a manifest
11 is taken from the bills of lading. The basic document.
12 Each individual shipment has a bill of lading. The manifest
13 is simply a compilation of all of bills of lading.
14 You might have six No. 1 bills of lading on a
15 ship. It designates the port of loading. They are con-
16 secutive port of loading. For Lorenzo marks it will be 1,
17 2, 3, 4, 5, 6; the bills of lading are numbered consecutively
18 at the port of loading and the next port of loading you
19 start anew.
20 You can have five or six No. 1's on a particular
21 ship but only have the one No. 1 for any particular port
22 of loading.
23 Q The basic document from which the stevedore
24 works is the manifest?
25 A Yes. He bills his time out for the ship,

gets paid by the manifest ton.

Q And he makes his delivery book from the manifest?

A From my observation, yes,sir.

Q Who prepares the sorting list?

A That can be done either by the Inwood freight department of the steamship company or sometimes it is done by the clerk at the pier, the receiving clerk -- rather, the delivery clerk at the pier who is going to receive the cargo from the ship.

Q Again, is the basic document the manifest in preparing this?

A Yes, the initial, the principal document, because that is also what the customs works on, is the manifest.

MR. WARNER: Thank you. I have no more questions.

REDIRECT EXAMINATION

XXX

BY MR. HOOPER:

Q Captain, Mr. Warner asked you whether the stevedore would have to be notified of a cross-delivery before it made changes in the delivery book.

Assume that the pier superintendent was personally contacted by the consignees surveyor and told that he didn't get his coffee, and was looking for his coffee and the pier superintendent said I think I have some somewhere

but once the congestion gets out of this pier after the strike, maybe I can find it; do you think that would be notification of the stevedore there was a cross-delivery?

A The stevedore's pier superintendent?

Q That's correct.

A Yes, the stevedore has been notified there has been a cross-delivery.

THE COURT: He has been notified at this point only there was a short delivery. He does not know what happened.

THE WITNESS: He was notified somebody received the wrong cargo.

THE COURT: No. He has only been notified the consignee didn't receive the right cargo. He doesn't know what happened. It might have been pilfered or dumped overboard.

THE WITNESS: Could be.

Q The delivery book at that time indicates that he discharged 2,000, 1600 or 2,000 bags of coffee to the consignee and the consignee reported only 928.

What would you assume happened?

A I didn't quite follow the mathematics..

Q The delivery book indicated the consignees' truck driver received about 2,000 bags of coffee before the

strike started. Yet the consignee said I only received 928 bags of coffee.

Would you infer a cross-delivery occurred?

A That would be one, or the truck was hijacked or whatever. Usually we have other records to tell what happened in the maritime industry.

Q Captain, I would like to direct your attention to this cargo plan, which is Exhibit No. 42.

The chief mate testified this morning that the cargo is stowed in such a manner that no cargo had to be shifted to allow New York cargo to be discharged first, and that the bags of coffee were separated according to ports with large sheets of burlap.

In addition to that, they were separated or identified by placing colored tape on each bag comprising the top tier of a different port.

In other words, if you discharged New York, down to, say, Norfolk, when you finished discharging New York you would get to a layer with colored tape on it.

A Yes, sir.

Q Do you think that the stevedore should be able to discharge all the New York cargo in those circumstances?

A Yes, sir. He should be able to. There is no over-stowage indicated or known at that time and the

optional cargo has to be so located and it should have -- it would have obvious methods of separation. Not complete methods. It wouldn't be completely barricaded because we still have to maintain ventilation. There would be staples, and strips of paper or rope yarns or netting over it to indicate that it is the optional, it is a lot by itself, optional New York or Baltimore.

Q Would you consider that separation to be enough?

A That as you described it, yes, I would expect it to be sufficient.

Q When the consignee's truck driver comes down to the pier with his delivery order, and assume the delivery order was made from the bill of lading description of cargo, and that delivery order indicated a different mark from the delivery book, what would the stevedore's delivery clerk do?

A First of all, the truckman who actually loads his own cargo would or should confirm that he is picking up the right cargo by looking at the first bag and if it is not the proper cargo then he notifies the checker who is standing at the tailboard of his truck that this is not the proper cargo, and he notifies the dock boss and the dock boss works it out with the delivery office on the pier.

Q All these people, the checker, the dock boss, the delivery clerk, by whom are they employed?

A By the stevedore terminal operator.

MR. HOOPER: I have no further questions on the subject of rebuttal. Third-party plaintiff rests.

MR. HART: We rest subject to bringing in my other witness and the sole purpose for that is to have him testify that all the Djimmas coffee that arrived at the Lehigh Distribution Center was picked up by him and brought back to New York. That is the only thing I expect from this witness.

THE COURT: I am surprised you cannot stipulate that but apparently you cannot.

MR. HART: Your Honor, it was my understanding and correct me of course, I thought through Mr. Herbert I was going to get this evidence without this other man but I see I can't.

I think he is a vital part of my case.

THE COURT: I have indicated you can supplement the record by his testimony.

MR. HART: The only thing I wanted to ask your Honor was this:

You said when can I get him and I said I can most likely get him in Tuesday but when I made that statement

I forgot this is a long festive weekend so I was wondering if I can bring him in Wednesday, Thursday.

THE COURT: I think we will have to set a date depending on my schedule. I have cases set for trial every day next week. I might be able to work this in early one morning or late on an afternoon.

MR. HART: I would like to make another suggest, and it is only made as a suggestion.

I am perfectly willing next week to take the deposition of this man, if they will stipulate I can use it. He is not a hundred miles from the court, so therefore I can naturally subpoena him, bring him in. But if they are willing to stipulate that, I will waive the hundred mile requirement of his presence in court, I will take his deposition.

THE COURT: Any objection to having the Borchinius man taken by deposition?

MR. HOOPER: I have no objection, your Honor. Perhaps it would be faster, I would be willing to stipulate if he was called he would testify he got the correct coffee from this warehouse, the Lehigh warehouse and that he only got the correct coffee; he didn't get a windfall.

THE COURT: My understanding is Mr. Warner wouldn't so stipulate.

MR. WARNER: Your Honor, until today I never knew what happened to the coffee until Mr. Herbert got on the stand.

Now I finally learned what happened. I can't stipulate. We have got signed receipts here from Bochinius they received everything from the pier. Now suddenly they got a windfall.

He is trying to hang his stipulation that I will stipulate that Bochinius got just what they were entitled to and no more. I can't do that. It went someplace.

THE COURT: Are you willing to stipulate, and this is all the plaintiff is interested in as I understand it, that they got all of that Djimmas coffee that was at the Lehigh warehouse?

MR. WARNER: Yes, I will.

THE COURT: That takes care of what you are interested in.

MR. HART: Yes. I want to show all the Djimmas coffee, it went back to Bochinius.

THE COURT: With respect to the other question, whether they got a windfall by getting not only the Djimmas coffee they were entitled to but also the coffee that should have gone to Sprague & Rhodes, that seems to me not the subject of issue in this case but may be the proper

subject of a later suit against Bochinius.

In the event one of you gentlemen is liable in this case, I would think you have an action against Bochinius for reimbursement because of the windfall they got if they in fact got one.

MR. HOOPER: I would also think it would be simpler to bring in Bochinius in this case, your Honor. I would like to get that testimony from Bochinius.

THE COURT: It may be simpler for you. It is not simpler for me it if is not an issue in this case.

MR. HOOPER: I believe Mr. Warner is trying to make it an issue in this case.

THE COURT: Whether that is properly in issue is a different matter.

MR. HART: Yur Honor, I think my two propositions, I think -- not because I advanced them but I think they are very simple.

Proposition No. 1 is all the Djimmas coffee that went to the Lehigh Distribution Center was given back to Borchinius.

Proposition No. 2 is, if you will not stipulate to that, instead of me bringing the man in to court, may I take his deposition and you waive the hundred mile --

THE COURT: My understanding is that both the

defendant and the third-party defendant are willing to stipulate that Borchinius got all of the Djimmas coffee that was delivered to the Lehigh warehouse.

Mr. Hooper would like an additional stipulation that that is all the coffee they got out of this deal and Mr. Warner is not willing to make that stipulation but I do not think we have to have it to dispose of this case.

I think that is the subject of investigation in connection with a subsequent suit against Borchinius.

MR. HART: I am only asking for the first.

THE COURT: You have got it. So, you do not need the Borchinius man for your case.

MR. HART: Thank you.

THE COURT: He is resting. Have you got a witness?

MR. WARNER: During the luncheon recess we agreed on the exhibits, all three counsel, the court reporter attended and the ones that were objected to is duly noted on the record.

One of the documents that was received was Exhibit 1, which is a release of Pittston. Since that is in evidence, Pittston has not witnesses and rests.

THE COURT: Do you want to file post-trial briefs or have you covered all of the matters you want to

cover in your trial memoranda?

MR. WARNER: Your Honor, a lot of things happened today. My interrogatories got served upon the plaintiffs four years ago and I got no answer and I didn't know what happened to the coffee. I'm going to need time.

MR. HART: Your Honor, I'm offering this not only as an apology but the answers were never answered in the first instance because the third-party defendant claimed I was never in the case. Even in the memorandum he said I didn't have a direct claim against him.

THE COURT: Never mind that. The question now is, how much time do you need for your post-trial memoranda?

MR. HOOPER: Your Honor, I'm surprised by Mr. Warner's record at this point. I think Mr. Warner is asking for a release and if he is, I want to bring in rebuttal witnesses at this point.

If the words cargo claim in the release could mean cargo suits as Mr. Warner is claiming, I think we need testimony to explain that.

THE COURT: How long will the witnesses' testimony take and how soon can they get here?

MR.HOOPER: They can get here in twenty minutes.

THE COURT: How long will their testimony take?

MR. HOOPER: I would think an hour all together.

THE COURT: We will recess for twenty-five minutes and that will give you time to call them and get them up here and we will hear their testimony this afternoon.

Let me say, Mr. Warner, if you got somebody who wants to come in and give his version of the negotiations, if you can get him up here this afternoon, we will hear him too.

(Recess)

endt3

2 (Trial Resumed - 4:40 p.m.)

3

4 A R A S H I M S H I D I A N , called as

5 a witness, being first duly sworn, testified as

6 follows:

7 MR. WARNER: If it please the Court, out

8 of abundance of caution may I object on the ground the

9 release was prepared by their counsel, signed by their

10 counsel.

11 It is plain, clear, unambiguous.

12 MR. HOOPER: In the decision by former Chief

13 Judge Ryan, your Honor, denying Mr. Warner's motion for

14 summary judgment on the ground of this release, Judge Ryan

15 held there was an issue of fact as to whether or not this

16 release governs.

17 I think that statement answers Mr. Warner's

18 argument.

19 THE COURT: I am not sure that it does but I

20 will hear the testimony anyway and I will defer ruling on

21 your objection until I have had a chance to read the release

22 which I have not done and if it appears to me the release

23 is crystal clear on its face, I think the parol evidence

24 rule will apply.

25

DIRECT EXAMINATION

XX BY MR. HOOPER:

Q Will you state your occupation?

A I am an attorney associated with the law firm of Haight, Gardner, Poor & Havens.

Q I show you Exhibit No. 1, the release and direct your attention to the second page of that release, the indented paragraph.

THE COURT: Is there a copy here?

MR. HOOPER: It is No. 1 in that envelope.

THE COURT: All right.

MR. WARNER: We have the original here.

THE COURT: That is all right. I do not think there is any question about this being an accurate copy.

Go ahead.

Q Mr. Shimshidian, I would like to bring your attention to the wording "And any other cargo claims filed against Barber Steamship Lines" and so forth, up to November 13, 1972.

Could you tell me what the words "cargo claims" mean?

A Cargo claims in this instance meant where Barber Lines had been presented by claims for cargoes and damage by consignees here in New York and they had these

claims in their office and there was a possibility of a claim-over against the Pittston Stevedores, and that's just what it was, was a claim, in Barber Lines offices.

Q Were they suits, were they lawsuits?

A No, they were not.

Q Could you tell us why this language was inserted in this release, Exhibit No. 1?

A Well, the language was inserted in the release because specifically this release was intended to cover those claims which are attached to the release, giving the ship, the voyage, the amount and the settlement which myself and Mr. DeOrchis on behalf of Barber Lines discussed with Miss O'Keefe, a claims representative for Pittston Stevedores.

Q Could you tell me why you came to discuss these claims listed as Exhibit A to Exhibit No. 1, with Miss O'Keefe?

A As far as I can recall, Barber Lines here in New York had engaged Pittston Stevedoring Company to act as their stevedores and terminal operators with respect to ships that were operating on the Barber Lines.

There came a time when the contract for stevedoring and terminal operation services was to be expired or they weren't going to renew their contract.

So, before the contract date expired, they had, they meaning Barber Lines, had these claims and they wanted to discuss them with Pittston Stevedores.

Q So you discussed them as a package with Pittston Stevedores?

A Exactly.

Q Did you discuss each claim individually with Miss O'Keefe?

A Yes. We received a list of claims from Mr. Schneider, I believe it was, from Barber, he was the claim manager at the time, and he forwarded to our office, Mr. DeOrchis, and I worked with Mr. DeOrchis and we discussed each and every claim with Miss Keefe of Pittston.

Q I show you the letter and ask you if this is the one you are referring to, Exhibit No. 2?

A Yes, it is.

Q Is there a list of claims attached to that letter?

A Yes, there is.

Q I draw your attention to the last page of that list of claims. There are some claims typewritten and there are some claims written in by hand on that last page.

Why were some of the claims written in by hand?

A Well, as far as I can recall, when we received

these claims, they were the typewritten claims, but there was, if I can recall -- I spoke with Miss O'Keefe, and she wanted to make it absolutely certain that besides these claims that were typewritten, there were no more outstanding claims that Barber had to be presented against Pittston and I spoke with Mr. Schneider on the phone to go over his files once more to make sure because we were going towrap it up, we meaning Barber was going towrap it up with Pittston once and for all, any claims, and Miss O'Keefe told me over the phone she didn't want any more claims "coming out of the woodwork."

That I distinctly remember. Thereafter I called Mr. Schneider and told him what she told me and this resulted in a few additional claims coming to our office.

I believe it came from Mr. Schneider on his copy and that's my handwriting, listing the 44, 45, 46, 47, and 48, listing five more additional claims and also that's my handwriting on the bottom.

Q So that after the first claims that you received from Barber were discussed and settled with Miss O'Keefe, Barber found some additional claims?

A Yes. I told them to make sure, absolutely sure we were wrapping this out, that there were no more claims.

Q And those additional claims were handwritten at the bottom of that list?

A That's right. I believw they were handwritten by Mr. Schneider.

Q And did you settle those claims?

A Yes, we did.

Q During this whole period of negotiating the claims, did you discuss any lawsuits?

A Not at all. OUr discussions were based solely on the list you have shown me.

Q Do you know whether or not Miss O'Keefe even had the jurisdiction within the Pittston organization to discuss lawsuits?

A As far as I can recall in our conversations with her she told us all she has authority for these claims here, not for any lawsuits.

Q Is each claim that you settled listed on Exhibit A to the release?

A Yes, it is.

Q And is the settlement figure also listed on Exhibit A to the release?

A The total settlement figure is listed on the first page, $46,339.

Q That represents a total of all the settlement

figures which are listed in the right-hand column of the list, Exhibit A to the release?

A Yes. That is under the heading "Settlement". Those are the settlements we worked out with Miss O'Keefe.

Q What is the total amount of the settlement?

The total amount, $46,399.

Q What were the amounts of those additional claims? I believe you have them handwritten inon the other exhibit.

A Well, No. 44, that's my handwriting, "No pay" meaning that we agreed that the stevedore would not have to pay any monies on that claim.

Claim No. 45, "Stevedore will pay $55".

Claim No. 46, "Stevedore will pay $62".

Claim No. 47, "Stevedore will pay $1500" and claim 48, I don't think we got any money on that, but I can refer to the release and see

Q In any event, these are all fairly small claims?

A Yes, they are, right.

Q There was no claim in this list that was for $45,000?

A No, not at all.

Q You testified earlier that --

THE COURT: Did you draft this release?

THE WITNESS: Yes, your Honor.

THE COURT: What does this language mean when it says "Any other cargo claims filed against Barber Steamship Lines"? Doesn't that mean what it says, any cargo claims filed against them? How does that language exclude the type of claim we have in this lawsuit?

THE WITNESS: Well, the claim or the case that is before the Court today, your Honor, was not a case that was intended to be covered by this release.

THE COURT: Why did you use such broad language here? My question is, not what was in your mind at the time, but whether or not that language doesn't in its very terms include the type of claim that is involved in this lawsuit.

MR. HOOPER: May I explain that with another series of questions, your Honor?

THE COURT: Let him answer my question, if he can.

THE WITNESS: I didn't do any work on the case that is before the Court now, your Honor, but --

THE COURT: You did something with respect to this language. You must know what this case is all about.

THE WITNESS: Yes. I've been brought into the

case.

THE COURT: What is there in that language that prevents the language from reading on the claim made in this case?

THE WITNESS: Well, as I say your Honor, the release was intended to cover cargo claims we had against Pittston.

THE COURT: You used some very peculiar language. "I intend to release these following ten claims" perhaps, "but my release covers every claim that has been heretofore made or might hereafter be made against Barber Steamship".

THE WITNESS: In the case that is before the Court, there was a suit filed by plaintiff against the Barber Steamship Lines, but Barber Steamship Lines in defense of that case for non-delivery had a delivery receipt evidencing that the full consignment of the coffee was delivered to the plaintiff, and therefore really the plaintiff didn't have a case against the Barber Steamship Lines or the operators of the vessel.

As it turned out later on, the delivery receipt was in error and --

THE COURT: At that time this was drafted, this lawsuit had already been filed against Barber, as I understand it.

THE WITNESS: Yes.

THE COURT: It was pending, and it made a claim for a cargo loss or miss-delivery against Barber?

THE WITNESS: Cover loss, I believe it was, your Honor.

THE COURT: Well, a short delivery.

Now, why isn't this language applicable to that claim? Is there anything in the language itself that would prevent its applying to that claim apart from what you say was in the minds of you and perhaps the other persons who negotiated the contract?

THE WITNESS: I don't think I can answer.

BY MR. HOOPER:

Q Were any lawsuits filed against, or did you have any lawsuits between Barber and Pittston in your office at the time that this release was signed?

A Did we have in our office? Yes. I had one or two myself that I was handling with Mr. DeOrchis.

Q Are you acquainted with the Firnfield fire case?

A Vaguely familiar.

Q Do you know whether or not the Firnfield fire was released with this release?

A It was never intended to release the Firnfield

fire case.

THE COURT: Did Barber make a claim-over against Pittston because of the Firnfield fire case?

THE WITNESS: I'm not familiar with it, your Honor. Mr. DeOrchis is here.

THE COURT: Have you anything by way of a writing which would indicate that you and the others negotiators intended to release only the claims that are listed in Exhibit A?

THE WITNESS: Your Honor, unfortunately I don't have the file with me.

Q I would like to show you in that regard Exhibit No. 37.

Will you tell us what that is?

A Yes. That's a letter that was written to Mr. Wolfson, Shipowners Claim Bureau in reference to the claims which we discussed under the release.

Q Is that annexed to the list of the claims that were settled under the release?

A Yes, it is.

Q I would like to show you Exhibit 7 and ask you to tell us what that is.

A That's a letter written to Miss O'Keefe of Pittston Stevedores, with respect to the settlement that we

had consummated.

Q Does it refer to cargo claims?

A Yes, and specifically it refers to the four claims which were overlooked by Barber Lines which were forwarded to our office which we subsequently added to the release or which we subsequently negotiated the settlements for.

Q Does that include a discussion of any lawsuit?

A No, it does not.

Q You said Miss O'Keefe was finding more claims in the woodwork.

A She didn't want any more claims coming out of the woodwork, meaning Barber Lines' woodwork.

Q Not Haight, Gardner?

A No, Barber Lines' woodwork.

Q And she was discussing only cargo claims and you put the language cargo claims in the release and not "suits"?

A That's correct.

MR. HOOPER: I have no further questions.

THE COURT: Isn't the kind of claim in this case a cargo claim?

THE WITNESS: Involved here is litigation, your Honor, a case.

THE COURT: You would not have litigation if there were not a claim.

THE WITNESS: When we used the word claim here we meant a claim had been presented to a steamship company for loss or damage to cargo and it is still in the claim stage, namely in the hands of the claims manager for the Barber Lines, and conversely -- not conversely, but also, it was in the hands of the claims manager for Pittston.

When these two people cannot get together to negotiate a settlement, then it is sent out to attorneys for defense or for the handling.

THE COURT: I see. All right. I understand.

MR. HOOPER: I have nothing further.

CROSS EXAMINATION

XX BY MR. WARNER:

Q Mr. Shimshidian, Exhibit 1 is dated 13 November, 1972.

Did Chubb & Son present a claim to Barber Steamship Lines on 26 January, 1972? I show you Exhibit 19.

A Yes, it appears to be to be a claim by Chubb & Company against Barber Lines.

Q I show you Exhibit 14. Did Barber Lines reply to the claim of Chubb & Son?

A Yes, that's a reply from Barber to Chubb.

Q Is there reference made there to delivery records in the reply?

A Yes, in the second paragraph.

Q Who had care and custody of all the delivery records at that time?

A I don't know.

Q Barber Lines?

A Could be Barber Lines or Pittston Stevedoring.

Q Isn't it the custom of the trade for all the delivery records to be turned over to the shipowner at the time the vessel is completed so they can deal with the claims?

MR. HOOPER: I object, your Honor. Mr. Shimshidian is not an expert in stevedore procedures. He is here to discuss the release.

THE COURT: He has professed certain familiarity. I will permit it. He can protect himself. If he does not know, he can say so.

A Can you repeat the question?

(Question read)

A What do you mean by vessel is completed?

Q When the discharge is completed at the Port of New York.

A No.

Q When are the delivery --

A The delivery records are usually turned over to the steamship company after the deliveries had been made of the cargo at the pier in New York.

Q Which is what, a month or two after the vessel arrives?

A It depends on how fast the cargoes are picked up, whether they have any problems with delivery or whether-- there are a lot of factors involved.

Q At this particular time Barber did have delivery records, according to that letter?

A Yes, Barber is sending a copy of the delivery record to Chubb.

Q I show you Exhibit 11, a letter from Sprague & Rhodes to Barber. This is dated October 15, 1971.

My question to you is: Was Barber apprised there was a cargo claim pending on October 15, 1971?

A This is a letter to show a certain amount of bags were weighed and there should have been out of the total amount of --

Q It indicates a cargo claim, does it not?

A Not necessarily. It is not a cargo claim per se. It's just a letter.

THE COURT: It is a notification of an intent

to file a claim and hold Barber responsible for losses, damages and expenses, if you look at the third paragraph.

The letter speaks for itself. He didn't have anything to do with writing it.

Q When was the suit by Sprague & Rhodes started against Barber Lines; do you recall?

A No, I don't.

Q Would the 3rd of August, 1972 refresh your recollection?

A No, it doesn't.

Q When did Messrs. Haight, Gardner, Poor & Havens have anything to do with the suit which is before us today?

A I don't know.

Q You didn't handle it?

A No. I don't believe I was in on the inception of this suit.

THE COURT: According to the clerk's record, that action was filed August 3, 1972.

Q Did there come a time in September 1972, when your firm was instructed by Barber to handle cargo claims, potential cargo claims which Barber had pending against it and in turn Barber was looking for indemnity from Pittston?

Did there come a time when you were asked to do

that by Barber?

A Yes.

Q And you handled that directly yourself?

A The negotiations with Pittston?

Q Yes.

A Myself and Mr. DeOrchis.

Q And at that time what brought about this negotiation was the fact that this long relationship between Barber and Pittston was coming to an end and Barber wanted to be sure that all of its outstanding matters were resolved; is that correct?

A Yes.

Q And that Barber was holding back from Pittston about $100,000 of its fees it had earned performing stevedoring services, is that correct?

A I don't know the exact figure but I do know they were withholding monies.

Q 75 or $100,000?

A Somewhere in that area. I don't know the exact figure.

Q There came a time when your office exchanged a check of Barber Lines for one of Pittston for $46,339. I refer you to Exhibit 8.

A Yes, the checks were exchanged on November 13th.

Q I ask you to read to the Court -- this appears to be a letter on Haight, Gardner letterhead addressed to Barber Steamship Lines, Exhibit 10, and it is dated the 13th of November and I ask you to read the second paragraph into the record, please, beginning on the first page.

A The second paragraph?

Q Yes.

A "Miss O'Keefe was concerned about your discovering any additional claims in the old files (like the four that were found at the last minute) and it was agreed that the release would cover all cargo claims filed against Barber up to today's date November 13, 1972. In other words, if you discover any old claims in your files now, they will have been released. On the other hand, any claims which are received after this date and which may involve Pittston will not have been released and will be treated separately."

Q Did Mr. DeOrchis have authority to execute Exhibit 1, to your knowledge?

A Yes, I believe hd did.

Q He had been authorized by Barber Lines and Barber Lines insurers to execute the release?

A Well, the release states that he executed it as attorney for Barber Steamship Lines and listing the

ships under Barber Lines -- the ones that operate under Barber Lines A.S.

MR. WARNER: No further questions.

MR. HOOPER: No further questions.

THE COURT: Mr. Hart, do you have any questions?

MR. HART: No, sir.

THE COURT: Any redirect?

MR. HOOPER: No, sir.

THE COURT: Thank you.

(Witness excused)

M . E . D E O R C H I S , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

XXXXX BY MR. HOOPER:

Q What is your occupation, Mr. DeOrchis?

A I'm an attorney.

Q What firm are you with?

A Haight, Gardner, Poor & Havens.

Q What is your position with the firm?

A I'm a partner in that firm.

Q We have had testimony this afternoon about cargo claims and cargo suits.

Can you tell me the difference between them?

A Yes. The way the claims industry is set up in the maritime field, the different lines or their underwriters have claims departments. A line, if it is a very small line might not have its own claim department, and might rely entirely on a claim department of an underwriter. These are known as adjusting companies and they hire people known as claims adjusters.

These claims adjusters handle huge amounts of small, run of the mill claims.

Q Stopping right there for a minute, are these claims adjusters lawyers?

A No, for the most part they are not lawyers. Very few. They do a service in the industry by getting rid of a lot of everyday claims that don't have to be litigated. Of course they try to avoid litigation.

When the claims adjusters cannot get rid of a case or claim, then either one side or the other will notify his opponent, well, we can't settle this, we are going to send it to lawyers.

If it is sent out to lawyers for cargo people, then those lawyers will file a suit and the suit is then served on the line, the line refers it back to its underwriters, the underwriters notify the adjusting company or

1 hpjw DeOrchis - direct

2 the claims department that if this matter can't be gotten

3 rid of, to refer it out to defense lawyers.

4 That's where a firm like ours comes into

5 the picture. Suits are sent out for defense.

6 There are occasions when claims adjusters are

7 able to settle a suit, but it is not very often, and

8 there are occasions where very large claims are sent out

9 to lawyers by the reason of the size of the claim or because

10 of the complexity of the claim and so there are times, not

11 very often, when a lawyer may handle a claim which is not

12 in litigation.

13 Q So there are two levels: One claim adjuster

14 stage, handling cargo claims, and another level, lawsuits,

15 where the lawyers are on each side and the matter is brought

16 before the Court.

17 Are you familiar with Miss O'Keefe from

18 Pittston?

19 A I met the lady on one or two occasions, I

20 think on two occasions in connection with this particular

21 release that is involved in this suit.

22 Q Would you say that she handles claims or

23 lawsuits?

24 A She is what is known as a claims adjuster.

25 Q So that the claims adjuster, say, on behalf of

Barber Lines, employed by Barber Lines or used by Barber Lines would discuss claims with Miss O'Keefe?

A In the ordinary course of events, that is what would happen. Miss O'Keefe would handle claims with the Barber Line people who handled claims. Ordinarily I wouldn't run into Miss O'Keefe.

Q If a claim, for instance a claim of like the Firnfield fire comes along, a big claim, then what would happen?

A The Firnfield fire was a suit and came to us as a suit involving a fire that occurred on Staten Island on a pier and a ship that we represented, the Firnfield, Barber Lines, was tied up at that pier having discharged cargo and after her cargo was discharged there was a fire on the pier, tremendous amount of destruction, not only the cargo and the pier but also the ship.

That resulted in a suit running into six or $700,000. When the suit was referred to us, we impleaded Pittston as a third-party in that suit.

Q Was this suit active at the time that the release, Exhibit 1 was executed?

A That suit had been already in litigation. Pittston had its lawyers in the case. We were the Barber Lines lawyers in the case.

Q Did this release, Exhibit No. 1, release that suit?

Pittston, after this release was signed, Pittston paid hundreds of thousands to settle the Firnfield fire case.

Q So they didn't rely on this release at all.

A Obviously it wasn't covered in the $46,000 release.

Q Looking at Exhibit A attached to the release, Exhibit 1, are these matters listed in Exhibit A claims or suits?

A Are you talking about the list, the two-page list?

Q Yes.

A These are claims. But, this is the sort of thing which ordinarily -- these are the sort of claims which ordinarily would not be referred to a law firm.

The reason this came about is that Barber Lines and Pittston were terminating their contract and they had these things pending in their respective claims department.

Both sides, I think, were anxious to get this thing cleaned up, get all claims cleaned up so when the contract came to an end there would be nothing pending, one against the other. And, they knew that if they left this

in the hands of claims adjusters it might go on for months, telephone calls back and forth trying to get rid of these claims, so they thought that in this particular case if they could take a whole bunch of claims and send them over to us and if we could sit down with someone from Pittston, in this case Miss O'Keefe, and quickly dispose of all the claims, that it would be worthwhile paying the lawyer's fee.

So, they sent over a whole stack of files and said try to get rid of these any way you can quickly, and so the files came over and we got in touch with Mrs. O'Keefe, and a meeting was arranged.

She had meanwhile gone over her files, and I had Mr. Shimshidian of our office analyze the bunch of files we had, one by one.

I know my answer is much more than your question but I thought we would save time.

Q Did you try to discuss all these claims as one unit with Miss O'Keefe or did you have to go down claim by claim?

A I talked with Mr. Shimshidian before Miss O'Keefe came over and said how does it look and we quickly ran over the claims. Some of them are very, very small, a couple of hundred dollars, $112, and I think the largest ten or

$11,000 and he quickly briefed me on each claim, and after doing that, I said, well, it looks to me like it is fifty percent. And, we made such an offer to Miss O'Keefe immediately. She said no, she was instructed to examine each claim individually and we would have to come up with a figure on the merits for each claim.

That's what we had to do because that's what her instructions were.

Q So you went down each claim, claim by claim and arrived at a figure?

A She came over to the office in an afternoon. It really didn't take that much time. We spent maybe, oh, two, two and a half hours. She had her bunch of files. We had of course -- each side had already read them so it was a question of picking out the file and saying this is about this and this is about that and we would reach a figure on the merits.

In some cases I paid her a hundred percent. In some other cases it turned out I didn't pay her anything and in some it was in between.

And by coincidence when we finally got out the adding machine and added up all these claims, and this was after a second meeting because there were two meetings, it came out to just about fifty percent.

Q Was the case now before the Court discussed at all?

A No, no lawsuits was discussed. It was this list of claims but then some trouble cropped up. At the end of the first meeting, we had gone over these claims and I had offered her $45,000, and then she had agreed. She went back to her office and I then received a telephone call from Barber Lines who, in the process of cleaning up their files, had found another half dozen or five or six claims. So, I had to call up Miss O'Keefe, which I didn't like to do and say to her, well, I'm very sorry, my client just found another four or five claims in their files and they are going to send them over. She was unhappy about it, but I said they are not just going to throw them away.

So, she said all right, look at the files and call me back.

So, they sent those four or five files over. They were added to the list, and we looked over them. Meanwhile I gave her the numbers. She pulled out her files and that resulted in an additional amount being added to the $45,000, which makes for the difference between the $45,000 and the amount in the release, which is $46,339.

Now, when it came time to agreeing on this figure, $46,339, Miss O'Keefe said, now look, I don't

want your client to start pulling out other files from their office, other claims, I want to be assured this is it, that they don't have any more.

So, I then wrote a letter to the client and explained to them that Miss O'Keefe, rightfully was saying if we are going to settle these, let's settle them once and for all, and so please look in your files because if you find any more claims they are not going to be covered by this release that she wants.

Q She was worried about claims that were in Barber Lines office at this time and that Barber Lines had looked at and could realize were claims against Pittston, is that correct?

A That's right. Claims that Barber Lines would look at the claims file and say from the facts this is a stevedore liability claim. Not all claims are handed over to stevedores, claims against the lines.

Q In the matter of suit was that in your office at the time the release was signed?

A The suit was in the office, but at the time there was no realization that this was a valid shortage claim.

Q Why was that?

A Well, because Pittston had furnished us with a

copy of their delivery receipt. The delivery receipt was signed by the truckers for the plaintiffs in this case and showed it was only six bails short.

So, our defense was this is a nothing case, nuisance value, you got your cargo, here is the situation and we gave them a copy of that delivery receipt.

Q So this wasn't a suit that showed any liability in behalf of Pittston or liability on behalf of anyone?

A No, because we were relying on the delivery receipt which we gave to plaintiff's attorneys. We didn't know that there was any liability on behalf of Pittston. In fact, as it turned out, that delivery receipt wasn't correct.

THE COURT: You wouldn't think the plaintiff had filed a lawsuit in the federal court over six --

THE WITNESS: The plaintiff had a large loss but the delivery records showed there was only a loss of six. Our assumption was it was their truck driver who stole the stuff. This happens every day but in this case it is not the way it turned out. Every day we get delivery receipts that may show complete delivery and yet a suit is filed for a large shortage and we are able to show it wasn't stolen or lost during the ocean carrier's segment; it was lost during the next segment, the truck driver.

That was our defense, we didn't do it, go chase the trucker?

Q Referring to page 2 of the release, the description, what did you intend by the language "and any other cargo claims filed against Barber Steamship Lines"?

A We are talking about the indented paragraph?

Q Yes, sir.

A That's something Mrs. O'Keefe -- it turned out to be indented like that -- that's what she wanted in the release and this she wanted when Barber Lines came up with those four or five additional claims from their office, and she said she wanted no more claims coming out of that -- coming out of the woodwork was the way she put it.

So, we agreed on this language. She initiated it but I agreed to it, and the language specifically refers to claims.

Now, if you look at the previous page, when we are talking about what we are not going to do to Barber Lines after we sign this release, you will find the usual language in a release which says that we are going to release Barber Lines from all "actions, causes of actions, suits, debts, controversies, agreements, judgments, claims."

THE COURT: It says you are going to release and discharge Pittston, not Barber LInes.

THE COURT: I'm sorry, that was a mistake on

my part.

Barber Line was going to release Pittston. That's the usual language, actions, causes of actions, suits and so on.

Finally you get down to claims. The subject matter of this release was not actions, causes of actions, suits, claims. It was simply claims, and defined by the fact that we have a list of claims, and she says -- we said, "Any any other cargo claims filed against Barber Steamship Lines."

So, we are talking about this type of animal which is on the list or any others like that, but we are not talking about lawsuits and in fact I would not have spoken to her about any lawsuit because she is not a lawyer, and lawsuits, I would be dealing with whoever the lawyers were for Pittston.

Q In other words, she didn't have the jurisdiction to deal with this suit?

A Once a claim is sent out by either a cargo claimant or by a stevedore, by a ship lines, to lawyers, then you speak to lawyers. You don't go back and talk to the claims people.

Q Who do you talk to?

A For instance, the Firnfield fire, I couldn't

1 talk to her because Pittston had lawyers in the case.

2 Q Did the parties intend when they signed this

3 release, Exhibit No. 1, to release the lawsuit now before

4 the Court?

5 A No.

6 MR. HOOPER: I have no further questions at

7 this time.

8 CROSS EXAMINATION

9 BY MR. WARNER:

XXXX 10 Q You are a senior partner in admiralty at Haight,

11 Gardner and one of the leading members of the Admiralty

12 Bar, Columbia Law School, and you are thoroughly familiar

13 with releases and you deal with them day in and day out,

14 do you not?

15 A That's right.

16 Q On your direct testimony a moment ago you said

17 that the claims that were encompassed within the release

18 were restricted to claims in something that was not in

19 litigation.

20 A It encompassed claims that would have come

21 from the claims department. The type of claims on this list,

22 ordinarily they would not be in litigation. None of these

23 claims were in litigation.

24 Q You say none of them were. I ask you to look

25 at 35, and tell me about that one, Exhibit 35.

A Is that on the list?

Q I think so. No. 50, $2,220.

A Yes. Well, Miss O'Keefe can explain that to you. Miss O'Keefe brought this file over. This was her list. She had No. 50 on this list.

Q How about the letter you are reading from? That's from your client.

A Yes.

Q Telling and alerting it, and they boated it and you should deal with this one at a time.

A May I read this letter?

Q Certainly.

THE COURT: I think the critical inquiry is whether or not this claim that is referred to in Exhibit 35 was the subject of a lawsuit.

Was it ever the subject of a lawsuit?

THE WITNESS: There had been a lawsuit submitted by Hill, Rifkins but had not reached the stage of being sent out to attorneys. It was on the list she brought over with her, so we discussed it and these people who are adjusters for our side of the fence pointed out that they had this claim and what were we doing with it in effect and it was all straightened out when the client said that's all right, Haight, Gardner has gotten rid of it and

that was the end of that.

But, it was Mi-s O'Keefe's list that included it. I had no way of knowing at the time. I could have called the client.

Q The letter was addressed to you from Shipowners Claims Bureau, and refers to your letter and it has here a caption which refers to a summons by Hill, Rifkins, and they ask you to deal with this one and it is hooked on to the bottom of that list and it is settled at this meeting with Miss O'Keefe.

Is that a fair statement?

A That's a fair statement but that is not one of the additional claims.

Q My question is --

A What I'm saying neither Miss O'Keefe or myself realized when we discussed and settled that claim that afternoon that this was in suit and Shipowners Claims Bureau had the claim.

Q Isn't it a fair statement that the release covers at least one claim that was in litigation in the Civil Court of the City of New York wherein Hill, Rifkins, on behalf of caro interests had sued Barber? Is that a fair statement?

A Yes, and neither side knew that. Miss O'Keefe

didn't know it or she would have put it on this list.

THE COURT: You had been notified of it in this letter of November 6, 1972, hadn't you?

THE WITNESS: Yes. I had missed it also. We both didn't realize as we sat down that this was a claim that shouldn't be on the list. But, as it turned out both sides were satisfied with the figure we arrived at.

Q Let's pursue this line again.

Are you teling me that Haight, Gardner never communicates directly with the claims manager for Pittston and settles a claim without suing Pittston when it is in litigation?

A When it is in litigation?

Q Yes, before you bring a third party action.

A Then they don't have lawyers at that stage. I said once they have lawyers, we can't talk directly to a client or party any longer.

Q Within the last two or three weeks have you settled with Mr. Catrell of Pittston, who is sitting in the jury box, you, Haight, Gardner --

THE COURT: The question is a lawsuit as to which he has retained a lawyer .

MR. WARNER: He has not retained a lawyer.

THE COURT: That changes the picture. It is

unethical to contact a client after he has retained a lawyer.

Q In this particular case Pittston had not retained a lawyer in the matter which is before the Court today, had it?

A The Toronto?

Q Yes.

A That's right.

Q At the time of November 13th, Pittston had not instructed counsel and was not even in the case?

A It was not even a claim. We were relying onthe delivery record that they had given us which was a false delivery record.

THE COURT: But Barber had filed its answer on October 16, 1972 in this case.

MR. WARNER: Yes, and later on they got special permission to file a third-party complaint against us. They knew about this.

THE COURT: They must have sent it out to an attorney. Maybe Pittston --

MR. WARNER: Pittston had not been brought in the case, your Honor.

THE COURT: Barber had retained an attorney before the release was signed.

MR. WARNER: When the release was signed Haight, Gardner was representing Barber Lines in the litigation that is before you today.

THE COURT: As I understand what you are saying now, a matter is in claim even after a lawsuit has been filed up to the time it is sent out to trial attorneys?

THE WITNESS: It is in what we call the claim stage, and then it gets to the lawyers stage when it is sent out even though a suit may have been filed. Occasionally they are able to get rid of suits without lawyers.

THE COURT: All right.

Q Was Miss O'Keefe put on notice in any way, shape or form about the pendency of this claim that is before the Court today?

A Absolutely not. On this faithful day of the signing of the release, the situation as of that date was that the plaintiff's attorneys had filed the lawsuit against Barber Lines, claiming a very large shortage.

Barber Lines had sent that suit out to Haight, Gardner. Haight, Gardner examined the records and among the records supplied by Barber Lines was a delivery receipt they had obtained from Pittston.

The delivery receipt showed that apparently what the complaint alleged was wrong because the delivery

1 receipt showed only six short, which isn't worth arguing
2 about, you know. So, our defense to Messrs. Bingham,
3 Engler was, you are suing the wrong people, you only got
4 six short, not these hundreds of bags. Because we were
5 relying on the document Pittston had furnished us, nobody
6 thought about a claim against Pittston as of this day. It
7 was after we signed this release that we discovered that
8 the document that Pittston had given to our client, Barber
9 Lines, to wit, the delivery receipt, was incorrect, it was
10 a false document, that is, the information on it was not
11 correct and that the cargo people were in fact right that
12 there had been a huge cross-delivery by Pittston and at
13 that point we then impleaded Pittston into the case.
14 There was no way of our knowing before that,
15 that we had or Barber had a claim against Pittston because
16 of the document that Pittston had furnished to us.
17 Q Would you suggest there was deceit on the
18 part of Pittston, Miss O'Keefe?
19 A No. Miss O'Keefe didn't know either. Nobody
20 knew. The point is, a document had been prepared by someone
21 at Pittston, certainly not Miss O'Keefe, but someone at
22 Pittston who knew that there was a huge cross-delivery,
23 who nevertheless prepared a document that showed only six
24 short. That misled everybody. It misled Miss O'Keefe, me,
25

and these gentlemen. Everybody.

Q Did anyone at Barber know there had been a cross-delivery?

A That I don't know. I only know the actors in the case as of the time. You are asking me about Miss O'Keefe and the plaintiff's attorney, those people, I know what they were thinking because I was in on it at the time.

Q My question is, you were doing these negotiations. Was Barber aware at the time you signed the release on the 13th of November that there had been a cross-delivery?

A That I wouldn't know.

Q Did you make any inquiries to find out?

A No. We were investigating the claim all along to find out why are these people claiming such a huge short delivery when the record indicates only six short.

MR. WARNER: I have no further questions, sir.

REDIRECT EXAMINATION

XXX BY MR. HOOPER:

Q Mr. DeOrchis, referring to Exhibit 35, which I believe Mr. Warner showed you, the letter to yourself, the last portion of the first paragraph reads:

"We note that the captioned claim was not incorporated with the group of files submitted to you

by Messrs. Barber under date of October 3rd but was submitted at a later date."

At the time you received Exhibit 35, had you already negotiated a settlement with Miss O'Keefe?

A Yes. The settlement I think was October 10th, 11th, 12th, 13th.

Q All this letter says is, you settled a claim which we thought was a claim with you but now we realize was a suit?

A Well, it was a claim that had turned into a lawsuit at the claims level and in effect Messrs. Shipowners are saying, what are you doing, you settled a claim from under us, because we settled a claim not realizing at the time that this was still being handled by Messrs. Barbers -- that is, Shipowners Claim Bureau, the adjusting claims adjusters for Barber Lines.

Ordinarily would go from Barber Lines to Shipowners and from Shipowners if it gets into suit to us, that roughte. And here Miss O'Keefe, and she didn't know this either, and myself settled a claim which really we shouldn't have done without touching base with Messrs. Shipowners Claims Claim Bureau.

When they found out what the figure was, they said that sounds okay and that was the end of that.

MR. HOOPER: I have no further questions.

THE COURT: Thank you.

(Witness excused)

THE COURT: Mr. Warner, are you going to have any witnesses on this matter?

MR. WARNER: Your Honor, Miss O'Keefe left the employ of Pittston I guess a year or so ago and is living outside of Albany. She is not available.

However, Messrs. Haight did take her deposition. If they wish to put it in, they may. I don't intend to offer it.

THE COURT: Albany is more than one hundred miles away. They may certainly. Mr. Hooper has already indicated certain familiarity.

MR. HOOPER: I don't intend to put in the deposition.

MR. WARNER: I rest, your Honor.

MR. HOOPER: I would like to rebut one more thing, your Honor, Mr. Warner brought up. I can do it very shortly by recalling Mr. Herbert to the stand.

THE COURT: All right.

O T I S R. H E R B E R T, recalled as a witness, having been previously sworn, testified further as follows:

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DIRECT EXAMINATION

XXX BY MR. HOOPER:

Q Mr. Herbert, Mr. Warner raised the question of whether or not any cargo destined for New York could have been discharged during the vessel Toronto's call in Baltimore.

Do you have any way of determining whether or not, say, 780 bags of coffee were mistakenly discharged in Baltimore?

A Yes.

Q How can you determine that?

A The Baltimore stevedore bill which shows the revenue tons against the manifest which by the way I have checked and it is 783 tons discharged and that's what the manifest calls for.

Q The stevedore's bills in Baltimore show that the same tonnage as reflected, as destined for Baltimore on the manifest was discharged?

A Right.

Q Do you have the stevedore bill with you?

A Yes. It shows 483 tons discharged in Baltimore.

MR. HOOPER: I will remove this page, your Honor, so we don't have to mark the whole thing.

THE COURT: That is not the figure you gave --

THE WITNESS: I said 783. I meant 483.

THE COURT: All right.

MR. HOOPER: I offer it in evidence.

MR. WARNER: No objection.

MR. HART: No objection.

(Exhibit 64 was received in

xx evidence)

Q Mr. Herbert, do you know about how much a bag of coffee weighs?

A About 125, 135 pounds.

MR. HOOPER: I have no further questions.

THE COURT: About fifty kilograms?

THE WITNESS: Yes.

CROSS EXAMINATION

X BY MR. WARNER:

Q Mr. Herbert, stevedoring bills all over the world are prepared from the manifold?

A Right.

Q You are not suggesting in Baltimore they weighed and counted everything before they prepared a bill, are you?

A No, I'm not suggesting that at all.

Q The stevedore just takes the manifest and because the United States government, the Customs accepts it, he

accepts the figures and tonnage and runs his bill right off it?

A Right.

MR. WARNER: Thank you.

THE COURT: If they discharged several hundred bags of coffee wouldn't the weight of that coffee be reflected in the stevedore's discharge list?

THE WITNESS: Yes, they would know they discharged forty, fifty tons more than they should have.

THE COURT: Anything else?

All right. Thank you, sir.

(Witness excused)

THE COURT: How do you want to schedule the briefing? Do you want to do it sequentially or exchange main briefs and later, simultaneously exchange reply briefs, answering briefs?

MR. HART: Your Honor, speaking for the plaintiff, I would just like to reply to any briefs. I rely on my main brief and ask for time to reply.

MR. WARNER: I would like to know what his theory is in his action against me. I can see what it is against the shipowners but --

THE COURT: His action is not against you directly. It is against the shipowners. I take it the

1 shipowners making a claimover against you.

2 MR. WARNER: Are you trying to pursue a claim

3 against us as well?

4 MR. HART: I am pursuing a claim against the

5 third-party defendant and the third-party defendant is

6 pursuing a claim against you.

7 THE COURT: I think you misspoke. Pursuing a

8 claim against the defendant and the --

9 MR. HART: Yes, and the defendant against the

10 third-party, excuse me.

11 Now, the argument was advanced, legal argument,

12 that I have no claim against you under 14(c); so my claim

13 against you, is any claim I have against the defendant

14 and the defendant claims-over against you I have against

15 you.

16 THE COURT: That is only under the rule.

17 MR. HOOPER: Your Honor, we are taking the

18 position that this release is irrelevant because of the

19 direct 14(c) claim by plaintiff against Pittston. We have

20 briefed this in our trial brief.

21 THE COURT: This release is a little more than

22 a release. It is also a hold0harmless agreement, isn't it?

23 MR. HOOPER: Yes, for the amount on the

24 release. That's another factor to indicate the release

25

1 didn't intend to include this suit. It agrees to indemnify
2 and hold harmless Pittston up to the amount set forth
3 above from and against any claims, demands, suit or actions
4 brought against them against any third party --
5 THE COURT: I think the claim here is about
6 1,000 or two short of the $6,339.
7 MR. HOOPER: If you continue reading, on
8 page 2, it refers to, "By reason of the loss or damage to
9 shipments referred to on the attached list."
10 In other words, the hold-harmless agreement is
11 specifically limited to changes on the attached list.
12 THE COURT: I detect the conjunctive "and"
13 at the end of the second line below the insert "Pittston
14 Stevedoring Corporation."
15 They agree to indemnify and hold harmless
16 Pittston as aforesaid up to the amount of payment set forth
17 above from and against any claims -- all right, I guess
18 perhaps you are right.
19 MR. HOOPER: By reason of 14(c), the plaintiff
20 has a direct claim against Pittston and even if the Court
21 were to say it intended to release Pittston for this
22 lawsuit could not eliminate plaintiff's direct claim
23 against Pittston.
24 THE COURT: All right. I see your point.
25

Do you want to file a brief, a main brief or do you just want to file an answering brief?

MR. HOOPER: I would just as soon file an answering brief, your Honor.

Am I correct in assuming the summaries of the deposition I submitted to the Court are received in evidence in this case?

THE COURT: The depositions I suppose have been offered, have they?

MR. HOOPER: I would like to offer them, your Honor.

THE COURT: You have to offer the depositions otherwise I cannnot consider the summaries. I will look at the summaries and if any counsel want to contest the accuracy of the summaries or file a counter-summary, they can do that at the same time they file a brief. You are better off with the depositions.

MR. WARNER: That's all I want.

MR. HOOPER: I want to offer the deposition of Mr. Schneider who is now retired and currently on his way to Colorado for a vacation.

MR. WARNER: No objection .

MR. HART: No objection .

THE COURT: It is received.

(Exhibit 65 was received in

xxx evidence)

THE COURT: It seems Mr. Warner you are going to have the privilege to file the first brief and I will give you the privilege of filing the last one as well.

When can you file your main brief?

MR. WARNER: The 16th of July.

THE COURT: All right.

How much time will plaintiff and the defendant need to file their answering briefs?

MR. HART: I would like to have two weeks after receiving his brief.

THE COURT: All right. That will make it the 30th.

MR. HOOPER: I have planned to go on vacation the last week of July and first week in August, your Honor.

THE COURT: All right, then the 15th of August for you. Is that right?

MR. HOOPER: Thank you.

THE COURT: You might as well take until the 15th of August, if you want it, Mr. Hart. No sense in having his filed two weeks after yours.

MR. HART: That gives me a little hiatus.

MR. WARNER: May I have until the 23rd then, your Honor?

THE COURT: All right. He is going to be --

MR. HOOPER: I am not going to have a chance to see Mr. Warner's.

THE COURT: That only gives him one week. You can have ten days after you get their answering briefs to file your reply briefs. That will bring it up to the first day after Labor Day, when your reply brief will be due.

MR. WARNER: Thank you.

THE COURT: Thank you, gentlemen.

o0o

end

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Roger Iverson	9	21	30	31
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Ara Shimshidian	109	121		
M.E. DeOrchis	127	139	146	

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EXHIBIT INDEX

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36		77
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OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER ON NOTICE, CONNER, J., FILED 1 MARCH 1977.

U.S. DISTRICT COURT
FILED
MAR 1 1977
12:37 PM
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

- against -

S.S. TORONTO, her engines, boilers, etc.,

-and against -

WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC. and BARBER LINES A/S,

Defendants and Third-Party Plaintiffs,

- against -

PITTSTON STEVEDORING CORP.,

Third-Party Defendant.

- X

72 Civ. 3294 (WCC)

#45648

OPINION

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OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER
ON NOTICE, CONNER, J., FILED 1 MARCH 1977

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CONNER, D. J.:

The above-captioned action was instituted on August 3, 1972, in rem against the vessel S.S. "Toronto" [the Toronto] and in personam against her owner, Wilh Wilhelmsen, and her charterers, Barber Steamship Lines, Inc., and Barber Lines A/S [Barber]. On April 9, 1973, the third-party complaint herein was filed against Pittston Stevedoring Corporation [Pittston]. The issues raised by this admiralty suit for nondelivery of 781 bags of coffee allegedly shipped aboard the Toronto and undisputedly consigned to plaintiff were tried by this Court on July 1, 1976. This Opinion incorporates the Court's findings of fact and conclusions of law pursuant to Rule 52(a) F.R.Civ.P.

I.

On August 2, 1971, at the Port of Assab, Ethiopia, 2,099 bags of coffee, bearing the marks "A.B. Ghimbi Handpicked" and consigned to the order of plaintiff, were received for

shipment to New York (option Baltimore) aboard the Toronto under clean bills of lading nos. 5 and 6 issued by defendant Barber as carrier. Prior to loading, all cargo to be taken aboard the Toronto at Assab had been sorted, according to marks, and then tallied by the ship's agent pierside. A hatch list and stowage plan were prepared by the Toronto's chief mate by reference to mate's receipts and tally slips, all of which uniformly indicated that the entire consignment of "A.B. Ghimbi" coffee under bills of lading nos. 5 and 6, i.e., 998 bags and 1101 bags respectively, had been delivered to the Toronto; complete delivery to the vessel was confirmed by the ship's manifest, the latter prepared, in pertinent part, by the ship's agent at Assab.

Sailing directly from Assab to the Port of New York, the Toronto arrived at Pier 9A, Port Authority Terminal, Brooklyn, on September 4, 1971. From then to September 18, 1971, Pittston, at that time under stevedoring contract to Barber, discharged a portion of the New York-consigned cargo -- systematically segregated from other shipments by sheets of burlap -- from the Toronto, guided by reference to the vessel's manifest. On September 18, 1971, the Toronto sailed for Baltimore, there discharging, in accordance with the manifest, some 483 tons of Baltimore-slated cargo. Upon the Toronto's return to the Port of New York on September 22, 1971, the remainder of the New York cargo was unloaded from the vessel at Pier 9A.

OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER ON NOTICE, CONNER, J., FILED 1 MARCH 1977

No shortage of New York-consigned cargo was noted during the extended discharging process or upon completion of unloading at the pier. To be sure, the cargo was not tallied as it was discharged from the Toronto. Rather, having compiled in its Delivery Book a listing of consignments as reflected in the Toronto's manifest, Pittston accounted for the cargo per deliveries to the consignees. As of September 28, 1971, the Pittston Delivery Book indicated that truckers had received, for plaintiff's account, 998 bags of "A.B. Ghimbi" coffee under bill of lading no. 5 and 1041 bags of "A.B. Ghimbi" coffee under bill of lading no. 6. However, within a short time thereafter, plaintiff was notified by Lehigh Distribution Center, to which the consignment from the Toronto had been transported for storage, that only 928 bags of "A.B. Ghimbi" coffee had in fact been delivered for warehousing.

From October 1, 1971, through November 29, 1971, a longshoremen's strike at New York harbor halted all normal activity on Pier 9A. When a surveyor acting on behalf of plaintiff's underwriter visited the pier on December 1, 1971, congestion remaining in the wake of the two-months-long strike allowed him to do no more than to check Pittston's delivery records and to discuss plaintiff's claimed shortage with Pittston's Pier Superintendent. Pittston's records at that time reflected only a sixty-bag shortage in delivery of the subject consignment.

OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER ON NOTICE, CONNER, J., FILED 1 MARCH 1977

On December 9, 1971, the same surveyor visited the Lehigh Distribution Center and examined the warehouse receipts. The latter disclosed that a total of 928 bags marked "A.B. Ghimbi" had been delivered to the warehouse under bill of lading no. 5. Under bill of lading no. 6, however, Lehigh's receipts reflected a delivery of coffee bags marked "A. B. Djimmas." The surveyor's personal inspection of the coffee delivered from the Toronto to Lehigh confirmed the intelligence garnered from the warehouse tallies, i.e., that some 1,011 bags of Djimmas coffee, apparently consigned to an importer other than plaintiff, had been misdelivered to Lehigh in lieu of the Ghimbi coffee carried under bill of lading no. 6.

On December 13, 1971, the surveyor returned to Pier 9A and related his discoveries at Lehigh to the Pier Superintendent. The latter, acknowledging the fact of an obvious misdelivery, reported to the surveyor that an undetermined number of bags bearing the marks "A. B. Ghimbi" -- interspersed among bags marked "A. B. Djimmas" -- yet remained on the pier. On that same day, a sorting of the coffee cargo on the pier uncovered 268 bags of Ghimbi coffee. One week later, the surveyor located an additional 142 bags of Ghimbi coffee on the pier. Thereafter, Pittston altered its records to reflect the delivery of another 54 bags of Ghimbi coffee and, thus, an ultimate nondelivery of 6 bags out of the entire 2099-bag consignment. Beyond its essentially

cosmetic alteration of both its Delivery Book and its over-short-and-damage report, Pittston did not venture to probe the source and/or actual extent of, nor did it attempt to devise a cure for, the defects in delivery to which it had, through its superintendent, been alerted.

By February 1972, some 390 bags of "A.B. Ghimbi" coffee were forwarded from Pier 9A to plaintiff's warehouse. When combined with the initial deliveries to Lehigh, these new -- and final -- receipts left plaintiff with a total nondelivery of 781 bags of Ghimbi coffee under bills of lading nos. 5 and 6. Beyond unreinforced speculation, the whereabouts of the missing portion of plaintiff's consignment from the Toronto remain to date a mystery. The bags of Djimmas coffee that had mistakenly been delivered to plaintiff's truckers at Pier 9A, and from there transported to Lehigh, were eventually redirected to their rightful consignee.

II.

For reasons that will become clear in the light of subsequent discussion, the parties' paper submissions are devoted in substantial part to the operation of Rule 14(c) F.R.Civ.P. in the context of this case. Rule 14(c) provides as follows:

> "When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly

> liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over,contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff." (emphasis added).

Against Pittston's vigorous arguments to the contrary, plaintiff and third-party plaintiffs jointly urge the Court to conclude that the pleadings at bar supply, consonant with Rule 14(c), a basis for a direct claim by plaintiff against the third-party defendant. That argument rests upon the following bases:

(1) The third-party complaint alleges, inter alia, that any damages suffered by plaintiff as claimed in the complaint were caused by Pittston, which is therefore "primarily liable * * * and * * * obligated to indemnify the third-party plaintiff[s] for any and all damages * * * imposed upon them * * * ." Such allegations, according to plaintiff and third-party plaintiffs, have in substance raised a claim of Pittston's direct liability to plaintiff and were enough to set plaintiff and

third-party defendant at issue under Rule 14(c).

(2) In its answer to the third-party complaint, Pittston included an "Answer to the Complaint," thus evidencing, according to plaintiff and third-party plaintiffs, its understanding that it had been placed into direct contest with plaintiff.

In this respect, it is perhaps enough to note that the third-party complaint herein limits its demand to "judgment against the third-party defendant for all * * * sums which may be recovered by the plaintiff against defendants and third party plaintiffs * * * ." Where, as here, a third-party plaintiff has declined to demand judgment in the plaintiff's behalf -- as it is within its rights to refrain from doing, see 6 Wright & Miller, Federal Practice & Procedure § 1465, at 347 (1971) -- the Rule 14(c) provision for a direct right of action in plaintiff would not appear, at least in terms, to be applicable. Compare Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227, 1232 (3d Cir. 1976); Monarch Industrial Corporation v. American Motorists Insurance Company, 276 F. Supp. 972, 982 (S.D.N.Y. 1967), with Bilkay Holding Corporation v. Consolidated Iron & Metal Company, 330 F. Supp. 1313, 1316 (S.D.N.Y. 1971); Van Nood v. Federal Barge Lines, Inc., 282 F. Supp. 890, 893 (E.D. La. 1968).

OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER ON NOTICE, CONNER, J., FILED 1 MARCH 1977

Nor do Pittston's "Answer to the Complaint," incorporated within its answer to the third-party complaint and simply "den[ying] knowledge or information sufficient to form a belief as to the allegations" made by plaintiff, and those of its defenses that might impact on plaintiff's claim vis-a-vis defendants necessarily betray an acknowledgment by Pittston that might be fatal to its stance on the present issue. As another court has observed, "rule 14(c) is not exclusive of, but rather supplemental to rule 14(a) and * * * must be interpreted by reference to rule 14(a)." Rosario v. American Export-Isbrandtsen Lines, Inc., supra, at 1231 n. 10. And, under Rule 14(a), a third-party defendant "may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim." Moreover, the summons served upon Pittston by the third-party plaintiffs -- advising that, "There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer" -- is ample indication -- in light of the final sentence of Rule 14(c) -- that third-party plaintiffs did not intend, and third-party defendant might well not have understood, the third-party complaint to carry with it the consequence now urged by plaintiff and third-party plaintiffs.

Plaintiff and third-party plaintiffs nevertheless insist that the spirit of liberality informing the Federal Rules would forgive the third-party complaint's "technical oversight," i.e., its failure to demand judgment in plaintiff's

avor. This Court's accord with such proposition could not avail its proponents here. The principles of fairness that the Federal Rules have been designed to promote must, of course, operate evenhandedly; one party's defective pleading may not be cured if to do so would work an unjust prejudice to his adversary. In this case, therefore, the Court would be obliged to apply the same largesse sought by plaintiff and third-party plaintiffs, for their own account, to third-party defendant's pleading as well, in order to salvage Pittston's statute of limitations defense -- clearly articulated only now, via Pittston's post-trial brief, in the face of the direct-claim issue presently raised. That defense is derived from the bills of lading at bar,which provide, in relevant part, as follows:

> "All defen[s]es under this B/L shall inure to the benefit of the Carrier's agents, servants and employees and of any independent contractor, including stevedores, performing any of the Carrier's obligations under the contract of carriage or acting as bailee of the goods, whether sued in contract or in tort.
>
> * * * *
>
> " * * * [T]he Carrier and the Vessel shall be discharged from all liability whatsoever, unless suit is brought within one year after * * * the date when the goods should have been delivered."

Thus, on the basis of the above provisions, Pittston now asserts that any direct claim in plaintiff that might have been raised against it by force of the third-party complaint

herein would in any event have been time-barred. That assertion finds sufficient support in the bills of lading, coupled with the principle that, if the parties to a bill of lading clearly express an intention to extend a contractual benefit to a third party, that intention will be honored, and its consequences enforced, by a court of law. See Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 302 (1959); Cabot Corporation v. S. S. Mormacscan, 441 F.2d 476, 478 (2d Cir. 1971); Dorsid Trading Company v. S/S Fletero, 342 F. Supp. 1, 8 (S.D. Tex. 1972).

Third-party plaintiffs' suggestion that Pittston must be deemed to have waived its affirmative defense gives little pause in the light of earlier discussion. Moreover, decisions such as Strauss v. Douglas Aircraft Co., 404 F.2d 1152 (2d Cir. 1968), cited in proposed support of that suggestion, hardly serve their intended function: unlike cases such as Strauss, an eleventh-hour invocation of the limitations defense could not now cause plaintiff a hardship that might otherwise have been avoided.

Nor do third-party plaintiffs' remaining contentions in this connection require extended discussion. The terms of the bills of lading, as quoted above, are enough to contradict the proposition that plaintiff's direct claim against Pittston -- if such claim were acknowledged by this Court -- would be governed by the three-year limitation period controlling

negligence actions under New York law. And, understandably enough, third-party plaintiffs cite no authority for the proposition that the controlling period of limitation would have been tolled so long as the (unwittingly) inaccurate records maintained by Pittston obscured the facts of this case and Pittston's role therein.

III.

As indicated above, this Court concludes that plaintiff's legal recourse is confined to its claim against third-party plaintiffs. The merits of that claim need not detain us long. It is by now a well-established rule of admiralty law that, in the case of a claimed loss of goods by ocean carrier, the "bailor makes out a prima facie case of negligence merely by showing delivery of the goods to the bailee and failure to return at the required time." Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d 800, 812 (2d Cir. 1971). Defendants have not attempted to rebut plaintiff's proofs of delivery at the Port of Assab and nondelivery at Pier 9A; indeed, devoting their efforts to supporting the theory that plaintiff's loss occurred on the Brooklyn pier, defendants have impliedly acknowledged their liability to plaintiff under the contracts of carriage.

The third-party indemnity claim against Pittston rests on two alternate bases: Pittston's implied warranty of

workmanlike service under Pittston's stevedoring contract with Barber, see Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., 350 U.S. 124 (1956); David Crystal, Inc. v. Cunard Steam-Ship Co., 339 F.2d 295 (2d Cir. 1964); and Pittston's responsibility, to plaintiff as well as to Barber, as a bailee of the goods in question once the latter had been delivered into Pittston's custody.

Pittston's resistance against liability is centered upon the thesis that the bags of coffee at issue were never placed in Pittston's custody. This Court cannot subscribe to Pittston's conjectures on the point. The earlier-mentioned documentary proofs; the Toronto chief mate's observations on the careful loading procedures at the Port of Assab on August 2, 1971; Pittston's own failure to have noted a shortage in the consignment off-loaded at Pier 9A (beyond an initial 60-bag figure, and an ultimate 6-bag figure, that appear to be no more than the products of a confused accounting by Pittston); the method of cargo stowage on the Toronto, which allowed for ready identification and accessibility of New York-bound cargo during discharge at New York; the absence of evidence tending to indicate that any New York-bound cargo had been overcarried to Baltimore -- all of the above persuade this Court that the 781 bags of Ghimbi coffee were lost sometime after they had been discharged into Pittston's possession.

OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER ON NOTICE, CONNER, J., FILED 1 MARCH 1977

Finally, Pittston's suggestion that Barber's failure to return to Pittston the misdelivered bags of Djimmas coffee is somehow fatal to the third-party claim over is mentioned if only to demonstrate that it has not been overlooked. Although this Court is mindful that third-party plaintiffs might be foreclosed from the indemnity they seek in the event of "conduct on [their] part sufficient to preclude recovery," Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563, 567 (1958), Pittston has failed to demonstrate, or, indeed, to argue convincingly, that any sins of omission or commission arguably attributable to Barber with respect to the Djimmas coffee either caused the loss -- or prevented the recovery -- of the Ghimbi coffee involved in this case.

As the Second Circuit has noted in a similar context,

> "'In holding the stevedore liable though it it is not [necessarily] negligent, the courts have frequently stated that as between the shipper and the stevedore the liability should fall upon the party best situated to adopt prevent[ive] measures and thereby reduce the likelihood of injury.' * * * . In David Crystal, supra, this court said, 'the bailee is in a better position than the bailor to establish procedures to minimize the risk of misdeliveries and to insure against the few misdeliveries that will inevitably occur despite the most careful precautions.' 339 F.2d at 298. This applies equally well to mysterious disappearances of cargo in the custody of the stevedore/terminal operator." Stein Hall & Co. v. S. S. Concordia Viking, 494 F.2d 287, 291 (2d Cir. 1974).

OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER ON NOTICE, CONNER, J., FILED 1 MARCH 1977

IV.

There remains for consideration Pittston's contention that a release between it and third-party plaintiffs effectively disallows the indemnity claim herein. The strength of that defense must be gauged, at least in the first instance, by reference to the document itself. Executed on November 13, 1972, in exchange for the sum of $46,339, the release discharged Pittston

> "from all manner of actions, cause[s] of action, suits, debts, controversies, agreements, judgments, claims and demands whatsoever in any case of a civil nature whether at law, in equity or in admiralty, which against * * * Pittston * * * [third-party plaintiffs] ever had, now [have] or which [they], [their] successors or assigns, hereafter can, shall or may have, arising by reason of:
>
> > any damage or loss to the shipments of cargo included in the attached list, marked 'Exhibit A,' and <u>any other cargo claims filed against [third-party plaintiffs] up to November 13, 1972</u> * * * ." (emphasis added).

Third-party plaintiffs insist that the term "cargo claims" was not intended by the parties to extend the effect of the release to claims that had, by November 13, 1972, been transmuted into lawsuits, as had the instant matter. Pittston, in turn, maintains that the term unambiguously and fatally embraces the claim at bar; under such circumstance, Pittston argues, resort to "explanatory" proofs extrinsic to the document itself would be unnecessary and, indeed, improper under the parol

evidence rule.

With respect to a release, or any other written contract, the parol evidence rule's prohibition is by no means unbounded. Indeed, as this Circuit long ago observed, "that rule does not exclude evidence to interpret, explain, or clarify (rather than contradict) the written document." Rotberg v. Dodwell & Co., 152 F.2d 100, 101 (2d Cir. 1945). See Estate of Anton L. Trunk v. Commissioner of Internal Revenue, Docket No. 76-4125 at 1657-58 (2d Cir. February 2, 1977). And "the terms of any contract must be given a meaning by interpretation before it can be determined whether an attempt is being made to 'vary or contradict' them." United States v. Lennox Metal Manufacturing Co., 225 F.2d 302, 314 (2d Cir. 1955). Accordingly,

> "'In determining whether the * * * parties gave the same meaning to their express words and what that meaning was, or in determining whether one party gave a particular meaning to the words and the other knew or had reason to know that he did, * * * * the court should be advised of all the surrounding circumstances; of the meaning that is given the language of the agreement by common usage, by usage in the trade or business or profession of the parties; of communications between the parties during preliminary negotiations and during the execution of the writing; and of subsequent interpretations and practical application by either party that is assented to or acted upon by the other'." United States v. Lennox Metal Manufacturing Co., supra, at 314, quoting 3 Corbin, Contracts 45 (1951).

At the root of the negotiations that led to the release in question was Barber's decision, sometime during the

first half of 1972, not to renew its stevedoring contract with Pittston. Before the expiration of that contract's term, Barber and Pittston agreed to adjust their mutual accounts in accordance with a settlement of all claims then pending against Barber in which Pittston's liability might be involved. A list of claims pending in the Barber claims office was prepared for the negotiators and later appended as "Exhibit A" to the release. Although, in the more ordinary course, such claims would have remained within the province of Barber's claims adjusters, the "package" negotiation was assigned, in this less usual event, to Barber's attorneys. Acting on Pittston's behalf with respect to the negotiations was a Miss O'Keefe, then Pittston's claims representative. The negotiators undertook -- and eventually completed to their mutual satisfaction -- the laborious task of settling each claim -- over fifty, in all -- individually. When a number of additional claims, i.e., claims unaccounted for in the initial drafting of "Exhibit A," were discovered in Barber's claims office files, Miss O'Keefe expressed some concern lest others thereafter "come out of the woodwork" to plague her employer. Thus, it was to provide against such possibility, and at Miss O'Keefe's specific request, that the release was eventually framed by Barber's attorneys to include its "any other cargo claims" reference.

It was the testimony of the two attorneys who had negotiated the settlement on Barber's behalf that both parties

to the release had understood its terms to include only claims that had not risen -- or declined -- to the level of litigation, i.e., matters that were still pending in the Barber claims office files and had not yet been transferred to the office of counsel. The attorneys further testified that, to parties in the industry involved in such negotiations, the distinction between a "cargo claim" and a claim that has become the subject of a lawsuit -- as was the matter involved herein -- is clear enough. Pittston's own understanding that the term "cargo claim" did not extend to every matter involving a claim in the generic sense is evidenced by its failure to invoke the release as a defense in the "Fernfield Fire" case, a major claim involving both parties that was pending -- in the courts -- prior to November 13, 1972.

It may be noted that Pittston's failure to call witnesses -- Miss O'Keefe, for one -- to counter such evidence provides at least some added grace to the posture assumed by third-party plaintiffs. This is not to overlook Pittston's contention that the inference thus drawn is improper where, as here, the potential witness is equally available to both parties. But see United States v. Erb, 543 F.2d 438, 444 (2d Cir. 1976), and cases cited therein. Nor does this Court ignore Pittston's assertion that, under a familiar principle of contract construction, the release must be construed most

strictly against the party that drafted it. Nevertheless, this Court concludes, the application of that rule to resolve ambiguities that remain after resort to extrinsic evidence has proved unavailing, see Boswell v. Chapel, 298 F.2d 502, 506 (10th Cir. 1961), and cases cited therein, is inappropriate here: the evidence described above leaves the Court, unhappily for Pittston, with no doubt as to the intended meaning of the release.

V.

Defendants and third-party defendant do not dispute plaintiff's calculation of its damages, based upon the market price of the nondelivered goods at the time and place of their scheduled delivery, see The Daido Line v. Thomas P. Gonzales, 299 F.2d 669, 676 (9th Cir. 1962), in the sum of $44,422.44.

Third-party plaintiffs' demand for counsel fees and disbursements gives somewhat greater pause. It is the general rule, of course, that attorney's fees are not recoverable either as part of costs or of damages unless authorized by statute or by a contract between the parties. Hall v. Cole, 412 U.S. 1 (1973); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). In the present case, there is no applicable statutory authorization for the payment of legal fees and disbursements. Nevertheless, "in indemnity cases, the courts have regularly required the indemnitor to

OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER
ON NOTICE, CONNER, J., FILED 1 MARCH 1977

reimburse the indemnitee for the costs of defending the original suit * * * ." Demsey & Associates, Inc. v. S.S. Sea Star, 500 F.2d 409, 411 (2d Cir. 1974). See David Crystal, Inc. v. Cunard Steam-Ship Co., supra, at 300; Paliaga v. Luckenbach S.S. Co., 301 F.2d 403 (2d Cir. 1962). There is no equitable consideration peculiar to this case that might warrant a present departure from that norm.

On the basis of the foregoing, I find (1) for plaintiff in the sum of $44,422.44, together with interest at the rate of six per cent per annum computed on $42,863.77 from January 19, 1972, and on $1,609.48 from April 13, 1972,[1/] plus costs; (2) for third-party plaintiffs in the amount paid to plaintiff, together with costs, reasonable attorney's fees, and disbursements.

Settle judgment order on notice.

WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
March 1, 1977

OPINION #45648, DIRECTING SETTLEMENT JUDGMENT ORDER ON NOTICE, CONNER, J., FILED 1 MARCH 1977

FOOTNOTE

1. It should be noted that plaintiff has sought prejudgment interest running from September 4, 1971. Although the other parties have not taken issue with that application, this Court has nevertheless concluded that interest should run from the dates -- and be computed on the respective amounts -- of the two drafts by which plaintiff received from its insurer indemnification on its present claim. The insurer's payment to plaintiff, in the total amount of $44,422.44, equals precisely the sum awarded as damages herein -- to which the insurer is entitled as subrogee. Under such circumstance, an allowance of interest at a date preceding the payments made by the insurer/subrogee would constitute a windfall to the latter at the unfair expense of the other parties.

FINAL JUDGMENT #77425 IN FAVOR OF PLAINTIFF AGAINST DEFENDANTS AND SS TORONTO, ETC., CONNER, J., JUDGMENT ENTERED 24 MARCH 1977.

MAR 24 1977
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC. and BARBER LINES A/S,

Defendants and Third-Party Plaintiffs,

-against-

PITTSTON STEVEDORING CORP.,

Third-Party defendant.

72 Civ. 3294
(WCC)

FINAL JUDGMENT

#77425

The issues in the above entitled action having been brought on regularly for trial before the Honorable William C. Conner, United States District Judge, on July 1, 1976, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter, on March 1, 1977, having handed down its opinion directing that judgment be entered for the plaintiff (1) in the amount of $44,422.44 with interest at 6% computed on $42,863.77 from January 19, 1972, and on $1,609.48 from April 13, 1972, plus costs; and (2)

FINAL JUDGMENT #77425 IN FAVOR OF PLAINTIFF AGAINST DEFENDANTS AND SS TORONTO, ETC., CONNER, J., JUDGMENT ENTERED 24 MARCH 1977

judgment for the third-party plaintiffs in the amount paid to plaintiff, together with costs, reasonable attorneys' fees, and disbursements, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff, THE SPRAGUE & RHODES COMMODITY CORP., have judgment against the defendants, the S.S. "TORONTO", her engines, boilers, etc. and WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC. and BARBER LINES A/S, in the amount of $44,422.44, with interest in the total sum of $13,799.03, and taxable costs in the sum of $78.36 in the total amount of $58,279.83. and there being no just reason for delay of entry of the judgment pursuant to Rule 54(b) of the F.R.C.P.

Dated: New York, New York 10007
March 22, 1977

William C. Conner
United States District Judge

JUDGMENT ENTERED - 3/24/77
Raymond F. Burghardt
CLERK

ANDREW A. FITZPATRICK
NOTARY PUBLIC, State of New York
No. 30-4624891
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1978

BEST COPY AVAILABLE

STIPULATION AND ORDER THAT REASONABLE ATTORNEYS' FEES EXPENDED BY THIRD-PARTY PLAINTIFFS IN DEFENDING PLAINTIFF'S COMPLAINT AMOUNT TO $669.38.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC. and BARBER LINES A/S,

Defendants and Third-Party Plaintiffs,

-against-

PITTSTON STEVEDORING CORP.,

Third-Party Defendant.

- X

STIPULATION

72 Civ. 3294 (WCC)

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for Defendants and Third Party Plaintiffs S.S. Toronto, Wilh Wilhelmsen and Barber Steamship Lines, Inc. and Barber Lines A/S, and the attorneys for Third Party Defendant, Pittston Stevedoring Corp., that the reasonable

STIPULATION AND ORDER THAT REASONABLE ATTORNEYS' FEES EXPENDED BY THIRD-PARTY PLAINTIFFS IN DEFENDING PLAINTIFF'S COMPLAINT AMOUNT TO $669.38

attorneys' fees expended by Third Party Plaintiffs in defending Plaintiff's complaint amount to $669.38.

Dated: New York, New York
April 13, 1977

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Third Party Plaintiffs
S.S. Toronto and Wilh Wilhelmsen
and Barber Steamship Lines, Inc. and
Barber Lines A/S

By _____
A Member of the Firm
One State Street Plaza
New York, New York 10004

SYMMERS FISH & WARNER
Attorneys for Third Party Defendant
Pittston Stevedoring Corp.

By William Warner

SO ORDERED:
New York, New York

_____
U.S.D.J.

FINAL JUDGMENT #77517 IN FAVOR OF DEFENDANTS, THIRD-PARTY PLAINTIFFS AGAINST THIRD-PARTY DEFENDANT, CONNER, J., ENTERED 19 APRIL 1977.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
APR 18
S. D. OF N. Y.

C.W.

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC. and BARBER LINES A/S,

Defendants and Third-Party Plaintiffs,

-against-

PITTSTON STEVEDORING CORP.,

Third-Party Defendant.

FINAL JUDGMENT

72 Civ. 3294 (WCC)

#77,517

The issues in the above entitled action having been brought on regularly for trial before the Honorable William C. Conner, United States District Judge, on July 1, 1976, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter, on March 1, 1977, having handed down its opinion directing that judgment be entered for the plaintiff (1) in the amount of $44,422.44 with interest at 6% computed on $42,863.77 from January 19,1972, and on $1,609.48 from April 13, 1972, plus costs; and (2) judgment for the third-party plaintiffs in the amount paid to plaintiff, together with costs, reasonable attorneys' fees, and disbursements; and the attorneys for defendants and third party plaintiffs having

FINAL JUDGMENT #77517 IN FAVOR OF DEFENDANTS, THIRD-PARTY PLAINTIFFS AGAINST THIRD-PARTY DEFENDANT, CONNER, J., ENTERED 19 APRIL 1977

stipulated with the attorneys for third party defendant that reasonable attorneys' fees expended by defendants and third party plaintiffs to defend against plaintiff's complaint amount to $669.38; it is hereby,

ORDERED, ADJUDGED AND DECREED that the defendants and third party plaintiffs, S.S. Toronto, Wilh Wilhelmsen and Barber Steamship Lines, Inc. and Barber Lines A/S, have judgment against the third party defendant, Pittston Stevedoring Corp. , for: the $58,279.83 awarded to plaintiff in the Judgment dated March 22, 1977; post-judgment interest to the date of this Judgment amounting to $258.67; reasonable attorneys' fees in the amount of $669.38; and taxable costs in the amount of $1,140.12, for a total of $60,348.00.

Dated: New York, New York
April 18, 1977.

William C. Conner
U.S.D.J.

JUDGMENT ENTERED - 4/19/77

Raymond F. Burghardt
CLERK

BEST COPY AVAILABLE

DEFENDANTS, THIRD-PARTY PLAINTIFFS' NOTICE OF APPEAL FROM JUDGMENT ENTERED IN FAVOR OF PLAINTIFF ON 24 MARCH 1977.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
APRIL 25, 1977
S.D. OF N.Y.

THE SPRAGUE & RHODES COMMODITY CORP., Plaintiff,	
-against-	
S.S. "TORONTO", her engines, boilers, etc.,	NOTICE OF APPEAL
-and against-	72 Civ. 3294 (WCC)
WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC. and BARBER LINES A/S	
Defendants and Third-Party Plaintiffs,	
-against-	
PITTSTON STEVEDORING CORP., Third-Party Defendant.	

Notice is hereby given that Defendants and Third-Party Plaintiffs, S.S."TORONTO", WILH WILHELMSEN, BARBER STEAMSHIP LINES, INC. and BARBER LINES A/S, hereby protectively appeal to the United States Court of Appeals for the Second Circuit from a judgment entered by Plaintiff

DEFENDANTS, THIRD-PARTY PLAINTIFFS' NOTICE OF APPEAL FROM JUDGMENT ENTERED IN FAVOR OF PLAINTIFF ON 24 MARCH 1977

pursuant to Rule 54(b), of the Federal Rules of Civil Procedure on March 24, 1977.

Dated: New York, New York
April 22, 1977

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Third Party Plaintiffs
S.S."TORONTO" and Wilh Wilhelmsen
and Barber Steamship Lines, Inc. and
Barber Lines A/S

By _____
Member of the Firm
One State Street Plaza
New York, New York 10004

TO: THE CLERK TO THE UNITED STATES DISTRICT COURT
Southern District of New York

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff
14, Wall Street
New York, New York

SYMMERS FISH & WARNER
Attorneys for Third Party Defendant
345 Park Avenue
New York, New York 10022

THIRD-PARTY DEFENDANT'S NOTICE OF APPEAL FROM JUDGMENT ENTERED IN FAVOR OF DEFENDANTS, THIRD-PARTY PLAINTIFFS ON 19 APRIL 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

-against-

S.S. "TORONTO", her engines, boilers, etc.,

-and against-

WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC. and BARBER LINES A/S,

Defendants and
Third Party Plaintiffs,

-against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

Filed
May [illegible]
S.D.N.Y.

72 Civ. 3294 (WCC)

NOTICE OF APPEAL

Notice is hereby given that Third Party Defendant Pittston Stevedoring Corp. hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment (No. 77,517) dated 18 April 1977 and entered 19 April 1977, in favor of Defendants and Third Party Plaintiffs SS TORONTO, Wilh Wilhelmsen,

THIRD-PARTY DEFENDANT'S NOTICE OF APPEAL FROM JUDGMENT ENTERED IN FAVOR OF DEFENDANTS, THIRD-PARTY PLAINTIFFS ON 19 APRIL 1977

Barber Steamship Lines, Inc. and Barber Lines A/S against Third Party Defendant

Pittston Stevedoring Corp.

Dated: New York, N. Y.
18 May 1977

SYMMERS, FISH & WARNER

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TO:

The Clerk of the United States District Court
Southern District of New York

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